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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~442~~ 11

JUNIUS C. KLEIN, APPELLANT,

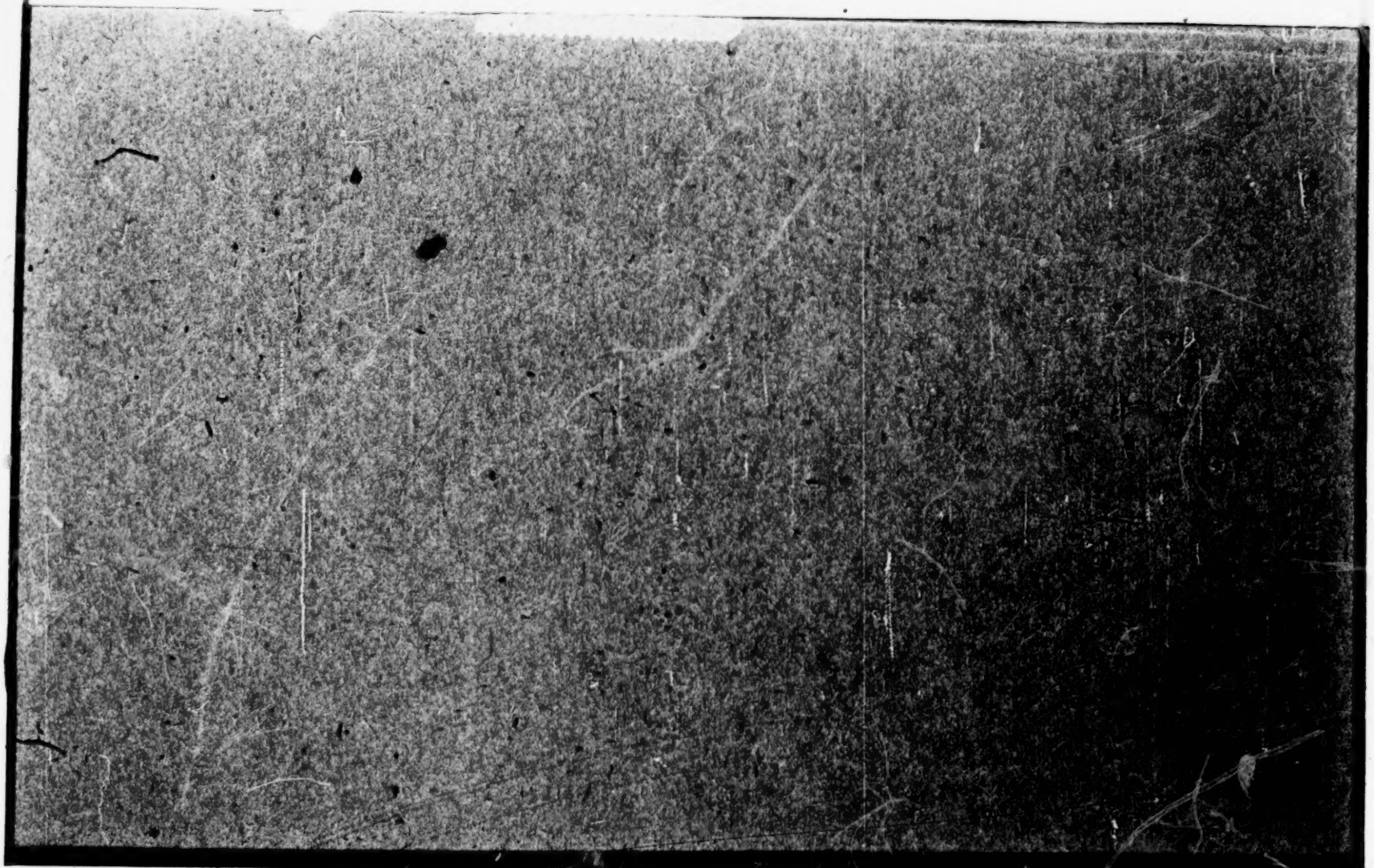
*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

FILED OCTOBER 14, 1929

(34,573)



# (34,573)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1929

# No. 442

JUNIUS C. KLEIN, APPELLANT,

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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[fols. 1 & 2] [Captions omitted]

[fol. 3]

**IN QUARTERLY COURT OF JEFFERSON COUNTY, NOVEMBER TERM**

No. 26195

JUNIUS C. KLEIN, Plaintiff,

versus

JEFFERSON COUNTY BOARD OF TAX SUPERVISORS, R. M. Martin, John Keller, E. W. Elliott, Ed. Plenge, William G. Fischer, John D. Moore, Walter F. Jacobs, George H. Hinesley, Defendants

JUDGMENT—Nov. 5, 1925; filed in Circuit Court Nov. 24, 1925

This cause coming on for hearing, came the appellant and tendered and moved to file an amended or supplemental statement on appeal, and the Court being advised, sustained his motion and ordered the amended or supplemental satement on appeal so tendered, filed, which is now done.

[fols. 4 & 5] And this action being submitted upon the pleadings and exhibits, it is ordered and adjudged by the Court that the action of the Jefferson County Board of Tax Supervisors in fixing and assessing for taxation for State purposes for the year 1925 of the common stock of the Standard Sanitary Manufacturing Company, held and owned by the appellant and all other holders and owners of such stock residing in Jefferson County, Kentucky at a valuation of $95 per share be, and the same is hereby sustained, and it is further ordered and adjudged by the Court that said valuation at $95.00 per share of the common stock of the said Standard Sanitary Manufacturing Company, at its fair cash value estimated at the price it would bring at a fair and voluntary sale thereof as of the first day of July, 1924.

It is further ordered and adjudged by the Court, that the appeal be and the same is hereby dismissed, to all of

which appellant and all other holders and owners of said common stock who reside in Jefferson County, Kentucky, object and except and pray an appeal to the Jefferson Circuit Court, which is hereby granted.

Certificates to foregoing paper omitted in printing.

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[fol. 6] Bond on appeal omitted in printing.

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[fol. 7] In Circuit Court of Jefferson County

Supersedeas

To Hon. Judge of the Jefferson Quarterly Court:

You are hereby enjoined from all proceedings on a judgment rendered in favor of Jefferson County Board of Tax Supervisors, B. M. Martin, John Keller, E. W. Elliott, Ed. Plenge, William G. Fisher, John D. Moore, Walter F. Jacobs and George Hinesley, against Junius C. Klein, by order of the Court fixing assessment for $200.00 and $13.10 costs, having appealed to the Jefferson Circuit Court, and given bond and security, according to law, in my office as Clerk of said Court, and you are hereby required to return the papers to said office.

Witness Frank Dugan, Clerk of said Court, this 24th day of Nov. 1925.

Louis Vissman, Clerk, by M. Canty, D. C.

[fols. 8 & 9] Came to hand Nov. 25, 1925, at 10.59 A. M.

Executed Nov. 25, 1925, on Judge of the Jefferson Quarterly Court, H. E. Tincher, by delivering to him a copy of the within Spds.

H. O. Gray, S. J. C., by A. Scharre, D. C.

Summons and sheriff's returns omitted in printing.

[fol. 10] In Quarterly Court of Jefferson County

[Title omitted]

[fol. 11] Appeal and Statement—Filed April 27, 1925; in Circuit Court, June 4, 1925

Appeal from the decision of the aforesaid appellees composing the Board of Supervisors of Tax for Jefferson County, State of Kentucky and the Board of Supervisors of Tax for Jefferson County, State of Kentucky, fixing the taxable value of property of the appellees, J. C. Klein.

Appellant states that he files herewith as part hereof marked "Exhibit A" a certified copy of the action of said Board of Supervisors of Tax for Jefferson County, State of Kentucky, under the hand of the Clerk of said Board.

Wherefore appellant prays that the action of the appellee, Board of Supervisors of Tax for Jefferson County, State of Kentucky, be set aside and held for naught, and that this Court adjudge that said assessment be assessed at the fair cash value estimated at the price said property would bring at a fair cash voluntary sale and for all equitable and proper relief.

J. C. Klein and Haswell & Lukins, Attys.

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[fol. 12] Exhibit A to Appeal and Statement

State of Kentucky,
County of Jefferson:

Before Board of Supervisors of Tax for Jefferson County, Kentucky, for State and County taxes *for State and County taxes* for the year 1925, at regular session at Court House in City of Louisville, viz:

At meeting of said Board as aforesaid on March 11th, 1925, the following is entered of record:

Whereas, there has been applications made for a construction and equalization of the assessment of the stock of the Standard Sanitary Mfg. Co. and whereas the Board has received the following statements or instruments of writing, to-wit:

This day came Junius C. Klein by his attorneys, Haswell and Lukins, and in person and as a stockholder of the Standard Sanitary Manufacturing Company for himself and for the benefit and use of all other stockholders of said Company who are subject to taxation for State taxes for the year 1925, and filed objections and the reasons there-
[fol. 13] for, to the assessment of the tangible property of said Klein by raising his household furnishings from $350.00 to $1,500.00, his jewelry from $50.00 to $500.00 and his miscellany from $50.00 to $500.00 and to the assessment of the intangible property of said Klein from $443,190.00 to $468,023.00 which later included his holdings of Common Stock of said Standard Sanitary Mfg. Co. which said Klein for himsel- and for the other common stockholders of said Company claimed to have been assessed at a valuation far in excess of its fair cash value estimated at the price it would bring at a fair voluntary sale, which valuation was fixed by the County Tax Commissioner at $95.00 per share. And in support of his contentions and objections asked for a hearing and offered to produce evidence in support thereof at this time or at any other time as the Board should fix and determine, all of which the Board declined to do and by unanimous vote sustained the said assessments as had and made by the County Tax Commissioner of Jefferson County, without allowing the claimants herein to offer their proof in support of a reduction of said assessments.

Wherefore, said Klein, by counsel, on behalf of himself and all other common stockholders of said Standard Sanitary Manufacturing Company, subject to State taxes for the year 1925, prayed an appeal, to the Quarterly Court of Jefferson County, which is hereby granted.

Walter F. Jacobs.

[fol. 14] Louisville, Ky., March 12, 1925.

To the Honorable Board of Tax Supervisors for Jefferson County, State of Kentucky:

GENTLEMEN: The undersigned respectfully objects to the assessment made by the County Tax Commissioner of Jefferson County, State of Kentucky, against him both as to tangible and intangible property, as of the first day of July, 1924, for the purposes of State and County taxes for the

year 1925, and requests a review to be made of same and a reduction of the valuation of its fair cash value, estimated at what it would bring at a fair voluntary sale thereof.

The specific tangible property was duly listed by undersigned at a valuation in excess of its real cash value, but the County Tax Commissioner has arbitrarily and without notice to us, raised said valuation, without any evidence to support his figures.

The assessment as to intangible property consisting mainly of stock in the Standard Sanitary Manufacturing Company was valued by said County Tax Commissioner at $95.00 per share over the protest and objection of this claimant, when the fair cash value of same as of the first day of July, 1924, was not in excess of its book value which is shown by the books of said Company to have been $38.61 per share.

[fol. 15] The County Tax Commissioner of Jefferson County has also similarly assessed the holdings of all other stockholders of said Standard Sanitary Manufacturing Company subject to taxations in this County of Jefferson, State of Kentucky, at said valuation of $95.00 per share.

That the question of the valuation of said stock in the Standard Sanitary Manufacturing Co. involves a common and general interest of many persons and the holders and owners of said stock are numerous and that it is impracticle to bring all of them before this Board of Tax Commissioners within a reasonable time and therefore the undersigned enters his objection to said assessment and makes his claim for a reduction in the valuation, to $38.61 per share, for the benefit and use of all other holders of stock similarly situated for the purposes of State and County taxes for the year 1925.

The objections to said assessment of said stock in the Standard Sanitary Manufacturing Company as had and made by the County Tax Commissioner of Jefferson County for State and County taxes for the year 1925, at $95.00 per share are several:

1st. The assessment was made and based on a speculative valuation and not on the actual fair cash value as provided for by law in such cases made and provided for.

[fol. 16] 2nd. That the said County Tax Commissioner in arriving at his valuation, relied entirely on hearsay evi-

dence as shown by certain newspaper as reports sale of said stock and not on the actual fair cash value of same as of the 1st day of July, 1924.

3rd. That, in fact, there was no sale of said stock had or made on the 1st day of July, 1924, and none were shown to have been so made by the said newspaper reports and that the County Tax Commissioner averaged up the sales of said stock as reported by said papers for the week before and the week after the 1st day of July, 1924, without notice to or consulting us in the matter, all this being contrary to the provisions of the law, in such cases made and provided for.

4th. That the said average was obtained by the County Tax Commissioner from alleged reported sale of small number of shares, averaging about 10 shares per sale which we submit is not fair or equitable to the holders of large blocks of said stock.

5th. That the real and actual assets and property back of and representing the said common stock of said Standard Sanitary Manufacturing Company as shown by its books and by the annual report of Theo. Ahrens, the President of said Company, for the year 1924, was not in excess of the sum of $40,000,000.00, whereas the assessment of said stock at a valuation of $95.00 per share, means that the said assets and property amount to the sum of $90,000,000.00, [fol. 17] being over twice its actual fair cash value. That the said stock should not be assessed at any valuation over its said book value which was $41.93 per share on the 31st day of December, 1924, and $36.29 on the 31st day of December, 1923, or an average of $38.61 per share on the 1st day of July, 1924. The par value of stock is $25.00 per share.

6th. That more than one half of the Common Stock issued by said Standard Sanitary Mfg. Co. and outstanding on the 1st day of July, 1924, was held and owned by citizens of this State of Kentucky and at same time at least one-third of the total assets and properties of said Company were located in this State of Kentucky and duly assessed against said Company for the purposes of State and County taxes, all of which have always been and will be paid by said Company. That by virtue of this state of facts the assessment com-

plained of herein is double taxation and contrary to the constitution of the State of Kentucky and therefore unconstitutional, as the owners and holders of said stock are the true and real owners of all of assets and property of said Company.

(Signed) Julius C. Klein.

Louisville, Ky., March 7, 1925.

To the Honorable Board of Tax Commissioners for Jefferson County, State of Kentucky.

GENTLEMEN: We, the undersigned, holders and owners of the number of shares of the Common Stock of the Standard [fol. 18] Sanitary Manufacturing Company set opposite our names, respectfully object to the assessment of said stock made against us for purposes of State and County taxes, as of the 1st day of July, 1924, for said taxes for the year 1925, and request you to review said assessments and to reduce same to a fair cash value, which we submit was the value of same as shown by the books of said Company on the 1st day of July, 1924.

Our objections to said assessments as made by the Assessor of Jefferson County at $95.00 per share are several:

1st. The assessment was made and based on a speculative valuation and not on the actual fair cash value as provided for by law in such cases made and provided for.

2nd. That the said County Tax Commission in arriving at his valuation, relied entirely on hearsay evidence as shown by certain newspaper reports of sales of said stock and not on the actual fair cash value of same as of the 1st day of July, 1924.

3rd. That, in fact, there was no sale of said stock had or made on the 1st day of July, 1924, and none were shown to have been so made by the said newspaper reports and that the County Tax Commission averaged up the sales of said stock as reported of said paper for the week before and the week after the 1st day of July, 1924, without notice to or consulting us in the matter. All this being contrary to the provisions of the law, in such cases made and provided for.

[fol. 19] 4th. That, the said average was obtained by the County Tax Commission from alleged reported sale of small numbers of shares, averaging about 10 shares per sale, which we submit is not fair or equitable to the holders of large blocks of said stock.

5th. That the real and actual assets and property back of and representing the said Common Stock of said Standard Sanitary Manufacturing Company as shown by its books and by the annual report — Theo. Ahrens, president of said Company for the year 1924, was not in excess of the sum of $40,000,000.00 whereas the assessment of said stock at a valuation of $95.00 per share means that the said assets and property amounts to the sum of $90,000,000.00 being over twice its actual fair cash value. That the said stock should not be assessed at any valuation over its said book value which was $41.93 per share on the 31st day of December 1924, and $36.29 on the 31st day of December, 1923 or an average of $38.61 per share on the 1st day of July, 1924. The par value of stock is $25.00 per man.

6th. That more than one half of the Common Stock issued by said Standard Sanitary Manufacturing Company and outstanding on the 1st day of July, 1924, was held and owned by citizens of this State of Kentucky and at same time at least one third of the total assets and properties of said Company were located in this State of Kentucky and duly assessed against said Company for the purposes of State and County taxes all of which have always been and will be paid by said Company.

[fol. 20] That by virtue of this state of facts the assessment complained of herein is double taxation and contrary to the Constitution of the State of Kentucky and therefore unconstitutional, as the owners and holders of said stock are the true and real owners of all of the assets and property of said Company.

(Signed) Almstedt Bros., F. H. Almstedt, A. H. Almstedt, Henry Almstedt, Wm. C. Almstedt, R. H. Almstedt, Sophia M. Almstedt, Elsa S. Almstedt.

Louisville, Kentucky, March 7th, 1925.

To the Honorable Board of Tax Supervisors for Jefferson County, State of Kentucky.

GENTLEMEN: We, the undersigned, holders and owners of the number of shares of the Common Stock of the Standard Sanitary Manufacturing Company set opposite our names, respectfully object to the assessment of said stock made against us for the purposes of State and County taxes as of the 1st day of July, 1924, for said taxes for the year 1925, and request you to review said assessments and to [fol. 21] reduce same to a fair cash value, which we submit was the value of same as shown by the books of said company on the 1st day of July, 1924.

Our objections to said assessments as made by the County Tax Commission of Jefferson County at $95.00 per share are several, viz:

1st. The assessment was made and based on a speculative valuation and not on the actual fair cash value as provided for by law in such cases made and provided for.

2nd. That the said County Tax Commission in arriving at his valuation, relied entirely on hearsay evidence as shown by certain newspaper reports of sales of said stock and not on the actual fair cash value of same as of the 1st day of July, 1924

3rd. That, in fact, there was no sale of said stock had or made on the 1st day of July 1924, and none shown to have been so made by the said newspaper reports and that the County Tax Commission averaged up the sales of said stock as reported by said papers in the week before and the week after the 1st day of July, 1924, without notice to or consulting us in the matter. All this being contrary to the provisions of the law, in such cases made and provided.

4th. That the said average was obtained by the County Tax Commission from alleged reported sale of small numbers of shares, averaging about ten (10) shares per sale, which we submit is not fair or equitable to the holders of large blocks of said stock.

[fol. 22] 5th. That the real and actual assets back of and representing the said Common Stock of said Standard Sanitary Manufacturing Company as shown by its books and by the annual report of Theo. Ahrens, President of said Company, published, for the year 1924, was not in excess of the sum of $40,000,000.00, whereas the assessment of said stock at a value of $95.00 per share means that the said assets amount to the sum of $90,000,000.00, being over twice its actual fair cash value. That the said stock should not be assessed at any valuation over its said book value which was $41.93 per share on the 31st day of December 1924, and $36.29 per share on the 31st day of December, 1923, or an average of $38.61 per share on the 1st day of July, 1924. The par value of that stock being $25.00 per share.

6th. That more than one-half of the Common Stock issued by said Standard Sanitary Manufacturing Company and outstanding on the 1st day of July, 1924, was held and owned by citizens of this State of Kentucky and at same time, at least one-third of the total assets of said company were located in this State of Kentucky and duly assessed against said Company for the purposes of State and County taxes, all of which have always been and always will be paid by said Company. That by virtue of this state of facts the assessment herein complained of is double taxation and contrary to the Constitution of the State of Kentucky and therefore unconstitutional as the [fol. 23] owners and holders of said stock are the true and real owners of all of the assets of the Company.

| Name | No. of shares |
|---|---|
| Charles P. Robinson | ..... |
| John S. Pope | ..... |
| Henry R. Grant | ..... |
| Hattie S. Truman | ..... |

The board of County Tax Supervisors after fully considering the above communications and examining all other evidence offered with a full membership present, sustained the assessment of the County Tax Commissioner in the assessment of Standard Sanitary Company Stock.

I, Fred O. Nuetzel, Clerk of the Jefferson County Court, Kentucky, and Clerk of the Jefferson County Board of Tax Supervisors for 1921 do hereby certify that the foregoing is truly, completely and correctly copied from original records in my office of which I am the custodian as such Clerk.

Witness my hand this March 31st, 1925.

Fred O. Neutzel, Clerk Jefferson County Court, Kentucky.

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[fols. 24 & 25] Summons and sheriff's returns omitted in printing.

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[fol. 26] In Quarterly Court of Jefferson County

[Title omitted]

Amended of Supplemental Statement of Appeal—Filed Oct. 14, 1925; in Circuit Court Dec. 4, 1925

Appellant, Junius C. Klein, appeals from so much of an order of the Jefferson County Board of Tax Supervisors, entered on its records on the 12th day of March, 1925, as sustains the assessment of 4591 shares of the Common Stock of the Standard Sanitary Manufacturing Company, held and owned by him on the 1st day of July, 1924, at the rate of $95.00 per share, had and made by the Jefferson County Tax Commissioner for the purpose of 1925 State Taxes.

Appellant makes the certified copy of said order filed herein with the Judge of the Quarterly Court a part hereof as Exhibit "A".

[fol. 27] That the appellees, R. M. Martin, John Kellar, E. W. Elliott, Ed. Plenge, William C. Fischer, John D. Moore, Walter F. Jacobs, and George H. Hinesley, are the duly appointed, qualified and acting Board of Tax Supervisors in and for Jefferson County, State of Kentucky, for the year 1925 and were in session from March 27th, 1925, until April 28th, 1925, at which time they adjourned sine die.

That appellant prosecutes this appeal from said action of said Board of Supervisors for himself and for the benefit of all other holders and owners of any of said Common Stock of said Standard Sanitary Manufacturing Company, all of which were assessed by said County Tax Commissioner for 1925 State Taxes at a valuation of $95.00 per share on their said respective holdings, which valuation is greatly in excess of its fair cash value, estimated at what it would bring at a fair voluntary sale, as of the 1st day of July, 1925, and that the valuation of same should not in any event exceed $39.11 per share for the Common Stock, which was the actual value of said stock as of the 1st day of July, 1924, as shown by the books of said company.

That the question of the valuation of said Common Stock for taxation purposes involves a common and general interest of many persons (to-wit: 1028) and the holders and owners of said stock are numerous and that it is impracticable to bring all of them before the court within a reasonable time.

[fol. 28] That appellant duly appeared before the said Board of Tax Supervisors, in person and by counsel on the 12th day of March, 1925, and filed his objections to said assessment in writing and asked to be allowed to introduce proof to sustain his said objections at that time or at such other time as the said Board should fix, all of which said Board refused to grant, but arbitrarily and without hearing any proof and over the objection of the appellant, sustained the assessment as had and made by the Jefferson County Tax Commissioner, at $95.00 per share.

Appellant further says that the assessment complained of herein is contrary to the provisions of the Constitutions both of this State of Kentucky and that of the United States in relation to the valuation of properties for taxation purposes, in that the said Common Stock of said Standard Sanitary Manufacturing Company was not assessed on a uniform or equal basis with other properties in said Jefferson County and State of Kentucky and therefore amounts to the taking of property from the holders of said stock without due process of law, and a withholding from them of an equal protection of the law of the land

and that the assessments complained of herein is double taxation and therefore null and void.

Appellant further says that the specific objections to said assessment complained of herein are as follows:

1st. That three-fourths of the total properties of the Standard Sanitary Manufacturing Company are located [fol. 29] outside of the State of Kentucky and are assessed and have a situs for taxation purposes in the various States of the United States outside of the State of Kentucky and taxes are paid thereon to said various states and are under the provisions of the laws of this state not taxable in this State of Kentucky.

That the value of the Common Stock of said Company depends entirely upon the assets of said company located outside of this State of Kentucky as well as that in this state and as three-fourths of these assets are non-taxable in this state, said Common Stock cannot be taxed on this three-fourths of its value and the assessment to that extent is null and void.

That the other one-fourth of its value also cannot be taxed as that part of its value is already taxed in the assessment against the Standard Sanitary Manufacturing Company in this State for 1925 State taxes. If this is done it would be manifestly double taxation as to that one-fourth, which is not authorized by our Constitution or Statutes in such cases made and provided for, for taxation of property; and would be in violation of the Fourteenth Amendment of the Constitution of the Federal Government. That the assessment therefore of said one-fourth of the value of said stock is also null and void.

2nd. That by virtue of Section 4088 of the Kentucky Statutes the State of Kentucky recognizes that holders of [fol. 30] shares of stock are entitled to and should be given some exemption from taxation for State taxes, at least to the extent of one-fourth of its fair cash value, depending for dull exemption, where the Company has assets in the State amounting to seventy-five per cent of its total assets, thereby recognizing that to legislate otherwise, would be double taxation or at least an unequal taxation.

That by failure to make any provision for cases where less than seventy-five per cent of the assets of the company

are located in the State, for a proportionate relief or exemption to stockholders on the same basis, the said statute becomes unequal and unjust and discriminatory and taking of property from stockholders without due process of law, in all cases where such assets of the Company in the State are less than seventy-five per cent of the total assets; all of which is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, which guarantees the equal protection of the laws to all persons.

3rd. Appellant further states that the Standard Sanitary Manufacturing Company has very large holdings of assets and properties in this State of Kentucky, all of which have been duly assessed in years past and for the year 1925 for taxation purposes and the taxes paid thereon as they became due and that the assessment herein complained of does not make any allowance for such assessment against the Standard Sanitary Manufacturing Company to lower [fol. 31] the valuation assessed against the stock of holders.

That the holders of Common Stock of said Standard Sanitary Manufacturing Company should at least be credited with the value assessed against the Company itself and thus reduce their assessed value therein materially; otherwise their assessment herein becomes double taxation to that extent, which is not uniform and contrary to law.

4th. That by sections 171 and 174 of the Constitution of Kentucky, all taxes are required to be "uniform upon all property of the same class" and "in proportion to its value."

That it is a well-known and recognized fact that real estate in the County of Jefferson and in the State of Kentucky is not and has not been assessed at its full value for taxation purposes as is shown by the tabulated statements required to be made by the County Clerks of the various Counties of the State showing the relation of assessments to actual sales of real estate during the year prior to July 1st, 1924, all of which statements are now in the possession of the State Tax Commissioner, which show real estate generally to have been assessed at from sixty to eighty per cent of its fair cash value estimated at actual sales had and made; and that therefore the assessment complained of

herein is far above that had of real estate in Jefferson [fol. 32] County and the State by at least twenty-five per cent, whereas the assessment complained of herein is over two hundred per cent of its fair cash value as shown by the books of the Company.

That in no event however has any real estate or other property been assessed for taxation in this County of Jefferson at its speculative value, due to favorable location in relation to the natural trend of business especially in and around the City of Louisville, or due to the necessity of purchasers, who often are compelled to pay exorbitant prices for land to round out their holdings.

5th. That the value of stocks in general of corporations, depend entirely on the properties or assets of company behind them and that the true and actual fair cash value of said stock should not and cannot be any sum in excess of the actual value of all of the assets and properties of the Standard Sanitary Manufacturing Company on the 1st day of July, 1924, as shown by the books of said Company, all of which appears in the annual report of the President of the Company for the year 1924 to be not in excess of the sum of $40,000,000.00, whereas the assessment complained of herein at $95.00 per share on the Common Stock fixes the assets and properties at the sum of over $90,000,- [fol. 33] 000.00, which is over twice the true value of said Common Stock.

That the book value of said Common Stock on the 31st day of December, 1923, was $36.29 per share, on the 31st day of December, 1924, of the value of $41.93, which by averaging as of the 1st day of July, 1924, fixes it at $39.11 per share. The par value of said stock is $25.00 per share.

6th. That by section 4052 Kentucky Statutes all property subject to taxation was required to be valued as of the 1st day of July of the year previous to the year for which taxes were to be raised. That there was no sale of said Common Stock had or made on the 1st day of July, 1924.

7th. That said assessment of said Common Stock was based on a speculative and fictitious value and not on the actual fair cash value as provided by law, due largely to rumors at the time, of a prospective stock dividend of 40% being declared and paid on said Common Stock in addition

to the regular cash dividend during the fall of 1924, which stock dividend in fact did not materalize during the year 1924.

8th. That of the holders of Common Stock of the Standard Sanitary Manufacturing Company, 1028 are residents of the State of Kentucky, ninety per cent at least of whom are residents of Jefferson County and the number of shares [fol. 34] of said Common Stock held by them is 202,083 as of the 1st day of July, 1924.

That the total number of shares of Common Stock issued and outstanding of said Company as of the 1st day of July, 1924, is 805,106 shares.

That the total number of shares of Preferred Stock of said Company issued and outstanding as of the 1st day of July, 1924, is 46,657 shares and the number of said date.

That the stockholders residing in Kentucky therefore hold and own approximately twenty-five per cent of said Common Stock and thirty-three per cent of said Preferred Stock.

That in addition to the assessment against the Standard Sanitary Manufacturing Company of its real estate and tangible property in the State of Kentucky for 1925 State, County and City taxes, the said Standard Sanitary Manufacturing Company pays a yearly franchise tax to the State of Kentucky for the privilege of doing business in the State and has complied with all obligations imposed upon it by the laws of this State in relation to taxation of its assets in this State of Kentucky.

Wherefore appellant prays judgment against the appellees, Jefferson County Board of Tax Supervisors, R. M. Martin, John Kellar, E. W. Elliott, Ed. Plenge, William C. Fischer, John D. Moore, Walter F. Jacobs and George H. Hinesley, holding and adjudging the assessment of the [fol. 35] Common Stock of the Standard Sanitary Manufacturing Company, held and owned by appellant and by all other residents of this State of Kentucky, by the Jefferson County Tax Commissioner and upheld by the said Jefferson County Board of Tax Supervisors, to be null and void and of no effect and illegal and that the same be stricken from the assessment rolls and that all tax bills against said holdings of said stock be held null and void.

Appellant further prays, in case this court shall not hold said assessment wholly null and void, that the said common stock hold and owned by appellant and other residents of the State be assessed at a valuation, not to exceed the book value of same, shown by the books of the Company to be $38.11 per share and holding same to be the fair cash value of said stock, and that said owners of said stock be allowed a further reduction on said valuation of at least 25%, to equalize said stock assessments with assessments of real estate in this Jefferson County and in the State of Kentucky, holding said real estate not to have been assessed at over 75% of its fair cash value for 1925 state taxes, and that a further reduction of said valuation be allowed in the amount of the assessment had and made against the said Standard Sanitary Manufacturing Company for 1925 State taxes of $2,263,390.00, to be applied to the reduction of the assessed valuation of said stock in proportion to said respective holdings, of those stock-[fol. 36] holders who are citizens and residents of this State of Kentucky.

Appellant further prays that Section 4088 of Kentucky Statutes be held and declared to be unconstitutional and of no effect and in conflict with and contrary to the provisions of section one of the Fourteenth Amendment of the Constitution of the United States and of the Constitution of the State of Kentucky.

And he prays for such other relief to which he and others similarly situated, may appear to be entitled and he prays as originally.

Junius C. Klein, Haswell & Lukins, Attorneys for Appellant.

[File endorsement omitted.]

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[fol. 37] In Quarterly Court of Jefferson County

[Title omitted]

Judgment—Nov. 5, 1925; filed in Circuit Court Dec. 4, 1925

This cause coming on for hearing came the appellant and tendered and moved to file an amended or supplemental

statement on appeal, and the Court being advised, sustained his motion and ordered the amended or supplemental statement of appeal so tendered, filed which is now done.

And this action being submitted upon the pleadings and exhibits, it is ordered and adjudged by the Court, that the action of the Jefferson County Board of Tax Supervisors in fixing and assessing for taxation for State purposes for the year 1925 of the common stock of the Standard Sanitary Manufacturing Company held and owned by the appellant and all other holders and owners of such stock residing in Jefferson County, Kentucky, at a valuation of $95.00 [fol. 38] per share be and the same is hereby sustained; and it is further ordered and adjudged by the Court that said valuation at $95.00 per share of the Common stock of the said Standard Sanitary Manufacturing Company is its fair cash value estimated at the price it would bring at a fair and voluntary sale thereof as of the first day of July, 1924.

It is further ordered and adjudged by the Court that the appeal be and the same is hereby dismissed, to all of which appellant and all other holders and owners of said common stock who reside in Jefferson County, Kentucky, object and except and pray an appeal to the Jefferson Circuit Court, which is hereby granted.

Enter.

Nov. 5/25.

Tincher, Judge.

O. K. Wm. F. Clarke, Jr., Asst. Co. Atty. Nov. 3, 1925.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

MINUTE ENTRY OF SUBMISSION

At a Court held on the 26th day of June, 1926.

[fol. 39] This action was set at rules by plaintiff on the 21st inst.

Came the defendant, by counsel, and moved the Court to transfer this action to an equity division of this Court.

It is ordered by the Court that this action be, and it is submitted on motion to transfer to the equity branch of this Court.

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In Circuit Court of Jefferson County, Common Pleas Branch, Third Division

Junius C. Klein, Plaintiff,

vs.

Jefferson County Board of Tax Supervisors, etc., Defendants

Motion to Transfer—Filed June 26, 1926

Come the defendants by counsel and move the Court to transfer the above styled case to an Equity Division of this Court.

T. M. Galphin, Jr., Counsel for Defendants.

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[fol. 40] In Circuit Court of Jefferson County

Minute Entry of Submission

At a Court held on the 9th day of October, 1926.

This action was set at rules by the plaintiff on the 4th inst.

Came the defendants by counsel and filed a demurrer to the amended and supplemental statement of appeal herein.

It is ordered by the Court that this action be, and is, submitted on demurrer.

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In Circuit Court of Jefferson County

[Title omitted]

General Demurrer—Filed Oct. 9, 1926

The appellees herein demur to the appellant's Amended or Supplemental Statement on Appeal for the reason that

the same does not state facts sufficient to constitute a cause of action against the appellees.

T. M. Galphin, Jr., Counsel for Appellees.

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[fol. 41] In Circuit Court of Jefferson County

Minute Entry of Assignment

At a Court held on the 29th day of January, 1927.

This action was set at rules by defendants on the 24th inst.

Came the defendants by counsel and moved the Court in writing filed, to set aside the filing and submitting of the general demurrer filed herein on the 9th day of October, 1926, and moved the Court to require the plaintiff herein to paragraph the separate causes of action alleged in his amended or supplemental statement on appeal and to re-file the general demurrer herein on the 9th day of October, 1926.

It is ordered that this action be and it is assigned to February 4th, 1927, for a hearing on said motions.

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In Circuit Court of Jefferson County

[Title omitted]

[fol. 42] Motion to Set Aside Submission of Demurrer, etc.—Filed Jan. 29, 1927

Comes the defendants by counsel and move the Court to set aside the filing and submitting of the general demurrer filed herein on the 9th day of October, 1926, and move the Court to require the plaintiff herein to paragraph the separate causes of action alleged in his amended or supplemental statement on appeal and to re-file the general demurrer filed herein on the 9th day of October, 1926.

J. Matt Chilton, T. M. Galphin, Jr., Counsel for Defendants.

IN CIRCUIT COURT OF JEFFERSON COUNTY

ORDER REASSIGNING CAUSE—Feb. 4, 1927

By agreement of the parties hereto, by counsel, it is ordered that the above styled action be and it is reassigned to February 10th, 1927, for hearing.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

MINUTE ENTRY OF SUBMISSION

At a Court held on the 10th day of February, 1927.

Came the appellant, by counsel, and filed a reformed, amended, supplemental statement of appeal herein.

[fol. 43] Came the defendant by counsel, and filed a demurrer as to the whole and to the 1st, 2nd and 3rd paragraphs of the reformed amended, supplemental statement of appeal herein.

It is ordered that this action be and it is submitted on said demurrer.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

REFORMED AMENDED SUPPLEMENTAL STATEMENT OF APPEAL—Filed Feb. 10, 1927

[fol. 44] The appellant, Junius C. Klein, for himself as the owner and holder of four thousand five hundred and ninety-one shares of the common stock of the Standard Sanitary Manufacturing Company, and on behalf of all other stockholders of the said Standard Sanitary Manufacturing Company, residing in Jefferson County, State of Kentucky, appeals from the judgment or ruling of the Jefferson County Board of Tax Supervisors entered on its records on the 12th day of March, 1925, assessing for the purpose of State Taxation for the year 1925, the common stock owned and held in the said Standard Sanitary Manufacturing Company, amounting to 202,083 shares, by the said Junius C. Klein, and all other stockholders residing in Jef-

ferson County, State of Kentucky, respectively, on the 1st day of July, 1924, at a valuation of $95.00 per share, over the written objection and complaint made before said Board of Tax Supervisors duly filed with said Board on the 12th day of March, 1925, a certified copy of which judgment or ruling was duly filed with the Judge of the Quarterly Court of Jefferson County on the — day of — 1925; which was within thirty days after the adjournment of said Board of Tax Supervisors and which is on file in this action as Exhibit "A."

That the appellees, R. M. Martin, John Keller, E. W. Elliott, Ed. Plenge, William C. Fischer, John D. Moore, [fol. 45] Walter F. Jacobs and George H. Hinesley, are the duly appointed qualified and acting Board of Tax Supervisors in and for Jefferson County, State of Kentucky, for the year 1925, and were in session as such board from March 27th, 1925, until April 29th, 1925, for the purpose of hearing complaints of taxpayers against assessments had and made by the Jefferson County Tax Commissioner for purposes of State taxes for year of 1925;

That the question of the valuation of said common stock of said Standard Sanitary Manufacturing Company for state taxation purposes involves a common and general interest of many persons, viz., 1,028 in number, all of whom are residents of Jefferson County, State of Kentucky, and the said owners and holders of said stock are numerous and that it is impracticable to bring all of them before the Court within a reasonable time;

That the Standard Sanitary Manufacturing Company is a corporation duly incorporated under and by virtue of the laws of the State of New Jersey, and was on the 1st day of July, 1924, doing business in the State of Kentucky, and was duly assessed by the Jefferson County Tax Assessor with real estate and tangible personalty owned and held by it, on the 1st day of July, 1924, in the State of Kentucky, in the prosecution of its business, at the sum of $2,263,390.00, on which said company has not only paid the state taxes for said year of 1925, but has also paid the [fol. 46] City of Louisville and County of Jefferson taxes for the same year; that said company duly paid its franchise tax for the said year of 1925, as required by law, and has complied with all provisions of the law required of for-

eign corporations to do business in the State of Kentucky;

That appellant, Junius C. Klein, for himself and on behalf of all the other stockholders aforesaid, appeared before the said Board of Tax Supervisors, in person, and by counsel, on the 12th day of March, 1925, and filed his objections to said assessments in writing, and asked to be allowed to introduce proof to sustain his said objections at that time, or at such other times as the said Board should fix, all of which said Board refused to grant, but arbitrarily, and without hearing any proof, and over the objection of the appellants, sustained the assessments as had and made by the Jefferson County Tax Commissioner of said shares of stock in the Standard Sanitary Manufacturing Company at the valuation of $95.00 per share.

A certified copy of said order is filed herein with the Judge of the Quarterly Court of Jefferson County, and is made a part hereof, and marked Exhibit "A" for identification.

The appellant for himself and for all other stockholders above referred to, further says that the assessment of said [fol. 47] shares of stock as aforesaid is illegal, null and void, and contrary to the provisions of the Constitution of the State of Kentucky Section 172, which reads as follows:

"All property * * * shall be assessed for taxation at its fair cash value estimated at what it would bring at a fair voluntary sale, * * *"

and is contrary also to the Fourteenth Amendment, Section 1, of the Federal Constitution, which reads as follows:

"Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The appellant further says that Section 4088 of the Kentucky Statutes under the provision of which the assessments complained of herein were had and made, is unconstitutional, and contrary to Section 172 of the Constitution of the State of Kentucky, and is also contrary to Section 171 of said Constitution, in that same is not uniform in its application to the assessment of shares of stock of the same class, and is a discrimination in favor of holders of shares

of stock in corporations having seventy-five per cent (75%) of their assets in the State of Kentucky, and a discrimina-
[fol. 48] tion against such as hold stock in corporations having less than 75% of their assets in this state.

Paragraph Two—Double Taxation

The appellant, Junius C. Klein, for himself, and for all other stockholders in the Standard Sanitary Manufacturing Company, residing in Jefferson County, State of Kentucky, further says that the assessments complained of herein and the assessments had and made against the said company of its real estate and personalty in this state is a double taxation, and is contrary to the scheme of taxation adopted by the State of Kentucky as held by the Court of Appeals in the case of the Commonwealth vs. Walsh, 117 S. W. 398; opinion by Judge O'Rear:

"Throughout the whole scheme of taxation adopted by the State there is an evident purpose to avoid double taxation and not alone in not taxing the same property twice in the same year for the same purpose, but as well in not taxing the same thing *whatever its form*, twice in the same year for the same purpose. Double taxation is recognized as oppressive and when it is imposed upon the same class of property and not upon others, works an inequality that is *fundamentally vicious.*"

[fol. 49] "While the constitution requires that all property shall be taxed and the General Assembly is prohibited from exempting any property from taxation not specifically exempted by Section 170 of the Constitution, it is not required that every phase of property shall be taxed. *Nor is it. Nor has it ever been done.* Property is the right to or interest in a thing. *A life tenant* owns property in land; so does the remainderman; so does the reversioner; so does the tenant for a term of years; yet there is but the *one thing.*

"A Corporation owns land; all of its capital is invested in the land. The corporation owns its capital stock. The shareholders own each then their share of the capital stock. Each is property. Yet there is *but one thing.* When the thing itself is taxed at its full value every element of it is made to bear the tax. The whole includes all of its parts.

When the State lays a tax upon the whole it has made all of its constituent parts contribute to the upkeep of the government."

That three-fourths of the total properties of the Standard Sanitary Manufacturing Company consisting of Real Estate and tangible personal property is located outside of the State of Kentucky and is assessed and has a situs for taxation purposes in the various states of the United States outside of the State of Kentucky, and taxes actually paid thereon to said various states and is under the provisions [fol. 50] of the laws of this State, not taxable in the State of Kentucky for any purpose whatsoever.

That the value of the common stock of said company depends entirely upon both the assets of the company located outside of the State of Kentucky, as well as that in this State and as three-fourths of their assets are non-taxable in this State, said Common Stock cannot be taxes on this three-fourths of its value and the assessment complained of herein to that extent is null and void.

That the other one-fourth of the total assets of the company are located in the State of Kentucky and were duly assessed by the Jefferson County Tax Commissioner as of the 1st day of July, 1924, for the purpose — State, County and City of Louisville taxes at a valuation of $2,263,390.00, and all such taxes have been duly paid together with a yearly franchise tax to the State of Kentucky for the privileges of doing business in this State, and that said company has complied with all obligations imposed upon it by the laws of this State in relation to taxation of its assets in this State.

That by virtue of the assessment against the said company, and the payment of its State taxes thereon for the year 1925, the assessment herein complained of against appellant and all the other stockholders of the shares of stock held by them, is double taxation and is null and void.

[fol. 51] Paragraph Three—Excessive Valuation

The appellant, Junius C. Klein, for himself and for all the other stockholders aforesaid in the Standard Sanitary Manufacturing Company, further says that the assessments herein complained of are greatly in excess of the fair

cash value of the said shares of stock estimated at what they would bring at a fair voluntary sale, as of the 1st day of July, 1924.

1. That the valuation of said stock should not in any event exceed $39.11 per share, which was the actual book value of said stock as of the 1st day of July, 1924.

That the valuation fixed by the asesssments as made in $95.00 per share; that the par value of said stock is $25.00 per share.

2. That there as no sale had or made of any of said common stock of said company on the 1st day of July, 1924, and in order to fix the valuation of s-id stock at $95.00 per shate, the Tax Commissioner of Jefferson County, averaged sales of said stock as reported by the Louisville papers as being made in the week before and the week after the said first day of July, 1924, which method is unfair and not as provided by law.

3. That said assessments of said Common Stock was based on a speculative and fictitious value due largely to rumors current at and before the 1st day of July, 1924, in the stock exchanges of both Louisville, Kentucky, and Pitts-
[fol. 52] burgh, Pennsylvania, in which said stock was listed on the exchanges that a prospective stock dividend of 40% would be declared and paid on said common stock in addition to the regular cash dividend during the fall of 1924, which stock dividend did not in fact materialize either in whole or in part during the year of 1924.

4. That the total number of shares of Common Stock issued and outstanding of said Standard Sanitary Manufacturing Company as of the 1st day of July, 1924, is 805,106 shares of which the appellant and stockholders residing in Jefferson County, hold 202,083 shares.

That the total number of shares of Preferred Stock of the company issued and outstanding on said date is 46,657 shares of which the appellant and other Kentucky shareholders hold 16,680 shares.

That the stockholders residing in Kentucky, therefore hold and own approximately twenty-five per cent (25%) of said Common stock and thirty-three per cent (33%) of said Preferred Stock.

That by Section- 171 and 174 of the constitution of Kentucky, all taxes are required to be "uniform upon all property of the same class" and "in proportion to its value."

That it is a well known and recognized fact that real estate in the County of Jefferson and State of Kentucky is not and has not been assessed at its full value for taxation purposes as is shown by the tabulated statements required to be made by the County Clerks of the various [fol. 53] counties of the State of Kentucky, showing the relation of assessments to ordered sales of real estate during the year prior to July 1st, 1924, all of which statements are now in the possession of the State Tax Commissioner which show real estate generally to have been assessed at from sixty to eighty per cent of its fair cash value estimated at actual sales had and made, and that therefore the assessment complained of herein is far above that had of real estate in Jefferson County, and in the State of Kentucky, by at least twenty-five per cent, whereas the assessment complained of herein is over two-hundred per cent of its fair cash value as shown by the books of the company as of the 1st day of July, 1924.

That is no event however has any real estate been assessed for taxation in the County of Jefferson at its speculative value, due to the favorable location in relation to the natural trend of business especially in and around the City of Louisville, or due to the necessity of purchasers, who often are compelled to pay ex*hor*itant prices for land to round out their holdings, whereas the assessment herein complained of was had and made on hearsay data furnished by the papers of Louisville as to the market or speculative value of stock on the exchanges, all of which is contrary to the constitution requiring values to be the fair cash value estimated by what it would bring at a fair voluntary sale. [fol. 54] That the valuation of said stock at $95.00 per share fixes the assets of the Standard Sanitary Manufacturing Company at a sum in excess of $90,000,000.00 which is nearly three times the book value of said stock.

Wherefore appellant prays judgment against the appellees, Jefferson County Board of Tax Supervisors, R. M. Martin, John Kellar, E. W. Elliott, Ed. Plenge, William C. Fischer, John D. Moore, Walter F. Jacobs and George

H. Hinesley, holding and adjudging the assessment of the Common Stock of the Standard Sanitary Manufacturing Company, held and owned by appellant and by all other residents of this State of Kentucky had and made by the Jefferson County Tax Commissioner and upheld by the said Jefferson County Board of Tax Supervisors, to be null and void and of no effect and illegal and that the same be stricken from the assessment rolls and that all tax bills against said holders of said stock be hale null and void.

Appellant further prays, in case this Court shall not hold said assessment wholly null and void that the said Common Stock held and owed by appellant and other residents of the State be assessed at a valuation, not to exceed the book value of same, shown by the books of the Company to be $49.11 per share and holding same to be the fair cash value of said stock, and that said owners of said stock be allowed a further reduction on said valuation of at least 25% to equalize said stock assessments with assess-
[fol. 55] ments of real estate in this Jefferson County and State of Kentucky, holding said real estate not to have been assessed at over 75% of its fair cash value for 1925 state taxes, and that a further reduction of said valuation be allowed in the amount of the assessment had and made against the said Standard Sanitary Manufacturing Company for 1925 State Taxes of $2,263,390.00 to be applied to said stock in proportion to said respective holdings.

Appellant further prays that section 4088 of Kentucky Statutes be held and declared to be unconstitutional and of no effect and in conflict with and contrary to the provisions of section one of the Fourteenth Amendment of the Constitution of the United States, and to the constitution of the State of Kentucky, and he prays for such other relief to which he and others similarly situated may appear to be entitled, and he prays as originally.

John P. Haswell, Attorney for Appellant.

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[fol. 56] IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

GENERAL DEMURRER—Filed Feb. 10, 1927

Comes the defendants herein and demur to the reformed, amended, supplemental statement of appeal of the plaintiff

and to paragraphs one, two and three therein, for the reason that the said reformed, amended, supplemental statement of appeal does not nor does each of the said paragraphs, or all of them, state facts sufficient to constitute a cause of action against the defendants, or each of them herein.

J. Matt Chilton, T. M. Galphin, Jr., Counsel for Defendants.

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[fol. 57] IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

DEPOSITION OF BEN MARSHALL—Filed Feb. 28, 1927

The deposition of Ben Marshall, taken by agreement at the office of the State Tax Commission, at the State Capitol, in Frankfort, Kentucky, on February 23, 1927, to be read as evidence in behalf of the plaintiff in the trial of the above styled action

The witness bring first duly sworn, deposes and says:

Examined by John P. Haswell:

Q. 1. Mr. Marshall, will you give you- full name and residence to the stenographer?

A. Ben Marshall. Residence, Frankfort, Ky. Occupation, Secretary of the State Tax Commission.

Q. 2. How long have you been continuously Secretary of the State Tax Commission?

A. Practically ten years, it lacks four or five months.

[fol. 58] Q. 3. Then you have been the Secretary of the State Tax Commission since the law was enacted creating it?

A. Yes, sir, since the first day of July, 1917.

Q. 4. As such clerk of the State Tax Commission you are the custodian of the records of the State Tax Commission, are you not?

A. I am.

Q. 5. Mr. Marshall, will you examine the records in your possession as such clerk and state what they show with reference to the assessment of real estate in the State of

Kentucky as of the first day of July, 1924, as compared with the sale value of same as shown by the lists of conveyances furnished by the respective clerks of the county courts of the respective counties of Kentucky?

A. I have made the examination, and the record is typewritten containing the amounts of land sales and the amount of lot sales for the preceding July 1, 1924, and in order to make my answer I am of the opinion that it would be necessary to file copy of these certifications, which I now do, and file the same and mark it for identification "BM #1."

Q. 6. Will you examine that list which you have just filed, and state generally what the relation is of the sale value of the lands with respect to the assessed valuation of the lands in the counties of Kentucky as a whole, and especially with respect to the County of Jefferson of the State of Kentucky.

[fol. 59] A. Without making an actual calculation, it is my opinion that the transfers made by the clerks of the date mentioned for the one hundred and twenty counties of the State, that the assessed value will average between 65 and 70 per cent of the sale value of the property transferred.

Q. 7. Will you examine this record, copy of which you have filed, and give me this information with respect to the sale values of lands in Jefferson County as compared with the assessed valuations of lands in Jefferson County, Kentucky?

A. Having examined the record it disclosed that the assessed value was 69.9 percent of the sale value in Jefferson County.

Q. 8. I will ask you, Mr. Marshall, whether or not in making this estimate you have just given you took into consideration the fact that the United States revenue stamps were required to be attached to all deeds made prior to July 1, 1924, for some years last past before said date.

A. In making the calculation to ascertain the percentage of the assessed value as compared to the sale value it was necessary in 90 per cent of the cases to use the revenue stamps as the basis of the real consideration in the transfer.

Cross-examination.

By O. S. Hogan, Assistant Attorney General:

X Q. 1. Mr. Marshall, are all holders of stock in corporations of the character and in the situation of the Standard Sanitary Manufacturing Company and other corporations [fol. 60] so situated, assessed and taxed in the same manner and upon the same basis?

A. They are, absolutely.

Re-direct examination

By John P. Haswell:

R.D.Q. 1. In the answer to the last preceding question, Mr. Marshall, you do not mean to state, do you, that the same taxing method with respect to the assessment of *teal estate it used when it comes to the assessment of* real estate is used when it comes to the assessment of such shares of stock, do you?

A. In my opinion real estate is assessed for more than 80 per cent of its value. There being no market quotations, this Commission is at a loss to find 100 per cent valuation on real estate. The valuation on Monday might be one price and by Saturday of the same week it might be advanced or depreciated more than 25 percent, for the reason that real estate is only transferred to particular individuals who want that particular peice or real estate for certain purposes, and it has a greater value to them than it does to the other 99 percent of the people in the same vicinity. Intangible personal property is required to be listed at 100 percent of its market value on the first day of July, and I believe in a great majority of cases, that which reaches the assessor's book is assessed at 100 per cent of its market value.

[fol. 61] R.D.Q. 2. You wouldn't undertake to say, would you, Mr. Marshall, that real estate is assessed in Kentucky at 100 percent of its market value as of the date it's assessed, would you?

A. No, I would not, but if I was asked if I thought the real estate would sell on the first day of July of any given year for its assessed valuation, I would be forced to answer that I think it woudl not.

R.D.Q. 3. That is to say, you are basing that question upon the sale of all of it on the same day?

A. I am basing the sales of stocks and bonds identically the same way.

R.D.Q. 4. Mr. Marshall, no entire issue of stocks and bonds of any one corporation are ever made on one day, are they?

A. No, and all the sales of real estate are not made on one day, it would be impossible.

Ben Marshall.

STATE OF KENTUCKY,
County of Franklin:

I, Mattie B. Morris, Notary Public in and for the County and State aforesaid, certify that the foregoing deposition of Ben Marshall was taken by me at the time and place stated in the caption; that said deposition was first taken in shorthand and afterwards transcribed by me, and that it was read and signed by the witness in my presence; that the plaintiff was present by attorney, John P. Haswell, and the defendant was present by the Assist-
[fol. 62] ant Attorney General, O. S. Hogan.

Witness my hand this 25th day of February, 1927.

Mattie B. Morris, Notary Public, Franklin County, Ky. My commission expires May 2, 1928. (Seal.)

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The following, "Exhibit BM #1," is filed with the foregoing Deposition of Ben Marshall and made a part thereto, to-wit:

[fol. 63]

EXHIBIT "B. M. #1"

Copy

Certification of Real Estate Transfers from July 1st, 1923, to June 30th, 1924, Showing Sale Value and Assessed Value; also Showing the Percentage the Assessed Value Bears to the Sale Value of Farm Lands and Town Lots Separately

| County | Land sale | Land assessed | Percentage | Town lots sale | Town lots assessed | Percentage | |
|---|---|---|---|---|---|---|---|
| 1. Adair | 159,192 | 108,884 | 68.4% | 57,251 | 39,905 | 69.7% | |
| 2. Allen | 214,578 | 120,144 | 56. % | 33,992 | 25,400 | 63.5% | |
| 3. Anderson | 283,763 | 164,892 | 58.1% | 91,277 | 48,750 | 53.4% | |
| 4. Ballard | 159,359 | 110,348 | 69.2% | 61,102 | 30,650 | 50.1% | |
| 5. Barren | 224,613 | 119,527 | 52.7% | 239,425 | 129,350 | 54. % | |
| 6. Bath | 353,685 | 272,486 | 77. % | 59,050 | 37,033 | 62.7% | |
| 7. Bell | 110,342 | 65,040 | 58.9% | 328,490 | 158,985 | 48.4% | |
| 8. Boone | 382,717 | 284,865 | 74.4% | 124,710 | 75,175 | 60.2% | |
| 9. Bourbon | 751,250 | 561,980 | 74.8% | 438,086 | 235,925 | 52.4% | |
| 10. Boyd | 401,311 | 144,885 | 35.9% | 3,729,283 | 1,716,902 | 46. % | |
| 11. Boyle | 148,963 | 94,445 | 63.4% | 658,824 | 311,877 | 47. % | Eliminate 2 |
| 12. Bracken | 268,839 | 170,525 | 63.4% | 143,358 | 87,495 | 61.2% | transfers |
| 13. Breathitt | 133,791 | 60,946 | 45.5% | 71,040 | 38,394 | 54.1% | and % is |
| 14. Breckinridge | 301,638 | 214,130 | 70.9% | 123,586 | 74,350 | 60.1% | 61. |
| 15. Bullitt | 209,815 | 144,149 | 68.6% | 75,429 | 47,330 | 62.7% | |
| 16. Butler | 92,522 | 77,270 | 83.5% | 22,000 | 17,475 | 79. % | |
| 17. Caldwell | 146,084 | 107,138 | 73.3% | 206,912 | 125,200 | 60.5% | |
| 18. Calloway | 174,995 | 128,408 | 67.6% | 205,680 | 108,335 | 52.6% | |
| 19. Campbell | 211,200 | 112,845 | 53.4% | 6,302,127 | 3,212,610 | 50.9% | |
| 20. Carlisle | 61,342 | 43,682 | 71.1% | 26,750 | 17,540 | 69.3% | |
| 21. Carroll | 183,386 | 119,544 | 65.2% | 155,580 | 87,990 | 56.5% | |
| 22. Carter | 294,246 | 146,612 | 49.7% | 115,409 | 61,630 | 55.5% | |
| 23. Casey | 83,906 | 67,490 | 80.4% | 24,615 | 18,000 | 73.1% | |
| 24. Christian | 596,236 | 397,765 | 63.9% | 645,253 | 351,885 | 54.5% | |
| 25. Clark | 382,242 | 283,300 | 74.1% | 452,529 | 305,475 | 67.5% | |
| 26. Clay | 167,511 | 101,011 | 60.3% | 32,071 | 18,500 | 57.6% | |
| 27. Clinton | 89,292 | 53,635 | 60.1% | 7,520 | 4,335 | 57.6% | |

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EXHIBIT "B. M. 21"—Continued

| County | Land sale | Land assessed | Per-centage | Town lots sale | Town lots assessed | Per-centage |
|---|---|---|---|---|---|---|
| 28. Crittenden | 294,181 | 194,625 | 65.1% | 155,543 | 100,348 | 64.5% |
| 29. Cumberland | 47,970 | 28,150 | 58.6% | 19,430 | 10,650 | 54.8% |
| 30. Daviess | 662,244 | 329,030 | 49.7% | 1,278,421 | 574,076 | 44.9% |
| 31. Edmonson | 53,925 | 39,085 | 72.4% | 1,475 | 1,225 | 83.0% |
| 32. Elliott | 62,755 | 42,147 | 67.1% | 3,800 | 2,300 | 60.5% |
| 33. Estill | 500,414 | 224,930 | 44.9% | 615,148 | 295,675 | 47.7% |
| 34. Fayette | 924,492 | 536,229 | 58.0% | 3,665,146 | 1,973,271 | 53.8% |
| 35. Fleming | 895,212 | 288,176 | 72.9% | 69,045 | 45,610 | 66.1% |
| 36. Floyd | 145,191 | 95,200 | 65.5% | 197,466 | 107,555 | 54.5% |
| 37. Franklin | 460,473 | 272,971 | 59.3% | 369,112 | 196,345 | 53.2% |
| [fol. 64] | | | | | | |
| 38. Fulton | 183,829 | 121,245 | 65.9% | 195,547 | 131,235 | 67.7% |
| 39. Gallatin | 121,290 | 72,935 | 60.1% | 51,931 | 30,075 | 57.9% |
| 40. Garrard | 551,949 | 403,093 | 73.0% | 67,070 | 48,045 | 71.6% |
| 41. Grant | 295,189 | 209,979 | 70.0% | 127,009 | 79,620 | 62.7% |
| 42. Graves | 494,624 | 359,845 | 72.8% | 319,435 | 191,075 | 59.8% |
| 43. Grayson | 105,293 | 67,900 | 64.3% | 35,325 | 21,015 | 60.0% |
| 44. Green | 123,929 | 696,800 | 56.2% | 24,115 | 12,015 | 53.7% |
| 45. Greenup | 625,748 | 12,900 | 50.0% | 209,895 | 83,050 | 39.9% |
| 46. Hancock | 51,211 | 40,049 | 78.2% | 44,977 | 29,725 | 66.1% |
| 47. Hardin | 86,728 | 62,980 | 72.6% | 59,325 | 32,240 | 54.3% |
| 48. Harlan | 114,667 | 38,993 | 34.0% | 647,170 | 323,583 | 50.0% |
| 49. Harrison | 432,502 | 299,156 | 69.1% | 195,282 | 122,575 | 62.7% |
| 50. Hart | 260,428 | 143,760 | 55.2% | 42,625 | 25,425 | 59.6% |
| 51. Henderson | 354,250 | 239,267 | 67.5% | 803,330 | 398,183 | 49.5% |
| 52. Henry | 344,965 | 208,098 | 60.3% | 152,970 | 92,300 | 60.3% |
| 53. Hickman | 94,759 | 65,896 | 69.5% | 18,967 | 15,795 | 82.2% |
| 54. Hopkins | 115,256 | 61,755 | 53.5% | 316,680 | 167,235 | 52.9% |
| 55. Jackson | 31,845 | 21,890 | 68.9% | 6,401 | 3,800 | 59.9% |
| 56. Jessamine | 235,796 | 180,071 | 71.2% | 266,727 | 121,173 | 45.4% |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 57. Jefferson | 4,280,342 | 2,999,995 | 69.9% | 38,883,550 | 23,519,347 | 60.4% | |
| 58. Johnson | 114,916 | 66,650 | 58.0% | 135,362 | 75,650 | 56.0% | |
| 59. Kenton | 132,152 | 74,800 | 56.5% | 8,456,709 | 4,834,070 | 57.1% | |
| 60. Knott | 177,942 | 103,659 | 58.2% | No lots transferred | | | |
| 61. Knox | 72,851 | 59,024 | 81.0% | 79,750 | 46,975 | 58.9% | |
| 62. Larue | 177,481 | 110,422 | 62.2% | 67,888 | 43,816 | 64.5% | |
| 63. Laurel | 71,756 | 49,253 | 68.6% | 38,570 | 21,390 | 55.4% | |
| 64. Lawrence | 71,485 | 38,079 | 53.2% | 192,570 | 108,125 | 56.1% | |
| 65. Lee | 76,584 | 41,082 | 53.4% | 26,200 | 16,950 | 64.6% | |
| 66. Leslie | 40,949 | 25,060 | 61.2% | No lots transferred | | | |
| 67. Letcher | 100,777 | 48,496 | 48.1% | 101,126 | 54,445 | 53.8% | |
| 68. Lewis | 240,661 | 162,600 | 67.5% | 74,592 | 48,575 | 65.1% | |
| 69. Lincoln | 735,851 | 318,342 | 43.2% | 115,716 | 75,570 | 65.3% | Eliminate 2 transfers and % is 65.6. |
| 70. Livingston | 28,243 | 14,159 | 50.1% | 7,050 | 2,600 | 37.0% | |
| 71. Logan | 423,347 | 305,428 | 72.1% | 115,783 | 78,550 | 68.0% | |
| 72. Lyon | 82,353 | 51,766 | 62.8% | 59,999 | 28,080 | 46.8% | |
| 73. Madison | 473,969 | 325,720 | 69.1% | 434,193 | 268,970 | 61.9% | |
| 74. Magoffin | 144,225 | 66,055 | 45.8% | 21,000 | 9,100 | 43.3% | |
| 75. Marion | 237,050 | 176,640 | 74.5% | 108,506 | 68,465 | 63.1% | |
| 76. Marshall | 66,016 | 43,950 | 61.2% | 14,908 | 9,005 | 60.4% | |
| 77. Martin | 67,948 | 30,884 | 45.4% | 14,555 | 6,260 | 42.3% | |
| 78. Mason | 258,070 | 203,656 | 78.9% | 388,050 | 245,710 | 63.3% | |
| [fol. 65] | | | | | | | |
| 79. McCracken | 356,979 | 219,485 | 61.4% | 1,561,178 | 806,305 | 51.6% | |
| 80. McCreary | 34,230 | 19,890 | 58.1% | 24,015 | 15,197 | 63.2% | |
| 81. McLean | 177,926 | 93,895 | 52.8% | 43,232 | 20,425 | 47.2% | |
| 82. Meade | 103,304 | 72,620 | 70.2% | 5,175 | 3,800 | 73.4% | |
| 83. Menifee | 36,505 | 29,118 | 79.7% | 2,781 | 2,100 | 75.5% | |
| 84. Mercer | 343,868 | 246,845 | 71.2% | 156,118 | 97,551 | 62.5% | |
| 85. Metcalf | 113,458 | 66,620 | 58.7% | 14,015 | 7,710 | 55.0% | |
| 86. Monroe | 83,073 | 50,044 | 60.2% | 30,292 | 19,000 | 62.7% | |
| 87. Montgomery | 181,255 | 113,240 | 62.4% | 350,707 | 205,130 | 58.5% | |
| 88. Morgan | 170,494 | 118,205 | 69.3% | 15,950 | 10,700 | 67.1% | |
| 89. Muhlenberg | 104,242 | 49,919 | 46.9% | 231,650 | 109,295 | 47.1% | |

EXHIBIT "B. M. #1"—Continued

| County | Land sale | Land assessed | Per-centage | Town lots sale | Town lots assessed | Per-centage | |
|---|---|---|---|---|---|---|---|
| 90. Nelson | 569,263 | 423,836 | 74.4% | 168,660 | 113,590 | 67.3% | |
| 91. Nicholas | 260,243 | 174,170 | 66.9% | 136,245 | 39,084 | 28.6% | Eliminate 1 transfer and % is 54.8. |
| 92. Ohio | 188,524 | 145,270 | 77.0% | 72,539 | 56,755 | 78.2% | |
| 93. Oldham | 427,351 | 266,353 | 62.3% | 64,825 | 41,790 | 64.5% | |
| 94. Owen | 420,810 | 251,104 | 59.6% | 101,196 | 62,495 | 61.7% | |
| 95. Owsley | 42,753 | 19,825 | 46.4% | 3,050 | 1,850 | 60.6% | |
| 96. Pendleton | 304,814 | 201,950 | 66.2% | 137,115 | 66,650 | 48.6% | |
| 97. Perry | 95,729 | 43,563 | 45.4% | 205,057 | 92,455 | 45.1% | |
| 98. Pike | 159,708 | 83,725 | 52.4% | 96,389 | 45,330 | 47.1% | |
| 99. Powell | 17,950 | 12,710 | 65.2% | 29,945 | 15,195 | 63.3% | |
| 100. Pulaski | 218,195 | 120,457 | 57.5% | 129,606 | 79,260 | 61.1% | |
| 101. Robertson | 92,737 | 40,109 | 43.2% | 32,265 | 9,425 | 29.2% | |
| 102. Rockcastle | 77,042 | 52,780 | 68.5% | 46,835 | 29,440 | 62.8% | |
| 103. Rowan | 105,097 | 72,927 | 69.4% | 51,275 | 32,150 | 62.7% | |
| 104. Russell | 75,620 | 43,985 | 58.1% | 13,075 | 8,850 | 67.6% | |
| 105. Scott | 597,091 | 415,248 | 71.7% | 302,632 | 198,770 | 65.6% | |
| 106. Shelby | 592,734 | 402,898 | 67.9% | 242,555 | 141,682 | 58.4% | |
| 107. Simpson | 590,689 | 287,015 | 48.6% | 279,828 | 165,780 | 59.2% | |
| 108. Spencer | 145,810 | 111,138 | 76.8% | 22,350 | 13,900 | 62.1% | |
| 109. Taylor | 116,407 | 109,273 | 57.5% | 279,003 | 55,660 | 20.0% | Eliminate 1 transfer and % is 50.6. |
| 110. Todd | 158,416 | 103,325 | 65.2% | 38,775 | 23,100 | 59.5% | |
| 111. Trigg | 303,387 | 183,198 | 60.3% | 36,120 | 20,575 | 56.9% | |
| 112. Trimble | 71,051 | 47,150 | 66.3% | 4,650 | 2,375 | 51.1% | |
| 113. Union | 253,568 | 152,244 | 60.9% | 181,216 | 93,240 | 51.4% | |
| 114. Warren | 422,770 | 290,430 | 68.6% | 546,983 | 331,375 | 60.6% | |
| 115. Washington | 270,245 | 157,506 | 58.2% | 64,675 | 35,538 | 54.9% | |
| 116. Wayne | 146,645 | 88,295 | 60.2% | 500 | 400 | 80.0% | |
| 117. Webster | 345,298 | 190,635 | 55.2% | 358,406 | 227,966 | 60.8% | |
| 118. Whitley | 122,363 | 69,205 | 56.5% | 318,667 | 193,770 | 60.8% | |
| 119. Wolfe | 62,050 | 40,505 | 65.2% | 9,285 | 7,125 | 76.9% | |
| 120. Woodford | 742,895 | 564,634 | 76.0% | 95,027 | 59,412 | 62.6% | |

[fol. 66] IN CIRCUIT COURT OF JEFFERSON COUNTY

MINUTE ENTRY OF SUBMISSION

At a Court held on the 12th day of April, 1927.

Now come the appellant and appellees herein and tender and move to file as part of the record the agreed stipulations of facts, marked for identification "JCK No. 1" and the Court being sufficiently advised sustained said motion, and said stipulations are now filed and made part of the record with the same force and effect as if evidence had been taken herein with respect to all the matters set up in said stipulations.

It is further ordered that this case shall now stand submitted upon the general demurrers heretofore filed herein by appellees, and also upon the whole case, both as to law and facts.

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[fol. 67] IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

STIPULATION AS TO FACTS—Filed April 12, 1927

It is hereby agreed by counsel for appellant and by counsel for appellees that the following stipulations of facts shall be considered as conclusive evidence of said facts at the trial of this action subject alone to competency and relevancy.

That the Standard Sanitary Manufacturing Company is a foreign corporation organized under, and by virtue of the laws of the State of New Jersey, and is duly authorized to do business in this State, and was so doing business in this State of Kentucky on the 1st day of July, 1924.

That it had issued and outstanding on the 1st day of July, 1924, 805,106 shares of Common Stock, of which Number 202,083 shares were held and owned by 1,028 persons, citizens and residents of, and domiciled in this State of Kentucky, on said 1st day of July, 1924, and all of whom have been assessed for 1925 State taxes on their respective holdings at the rate of $95.00 per share.

That the total number of preferred shares of said company issued and outstanding on said first day of July, 1924, was 46,667 shares of which number 16,680 shares are held and owned by persons, citizens and residents of the State of Kentucky

[fol. 68] That said stockholders residing in Kentucky, own and hold in round figures, Twenty-five Per Cent (25%) of the total issue of said Common Stock and Thirty-Three Per Cent (33%) of the total issue of said preferred stock.

That said Standard Sanitary Manufacturing Company, on the 1st day of July, 1924, held and owned properties and assets consisting of real estate and tangible personalty, located in Jefferson County, State of Kentucky, all of which was acquired and held by it for corporate purposes and all of which has been duly listed by said company for assessment for 1925. State, County, City of Louisville taxes and for all other purposes, and duly assessed both by the Jefferson County Board of Tax Supervisors for State taxes for the year 1925, and for all other purposes, at a total value of $2,263,390.00, which was its fair cash value estimated at the price it would bring at a fair voluntary sale, and which is over twenty-five per cent (25%) of the total assessed values of its total properties in twenty-one States of the United States of America, in which states the Standard Sanitary Manufacturing Company has its properties and assets and was doing business as of the 1st day of July, 1924; that the total assessed value of all of the said Standard Sanitary Manufacturing Company's assets and [fol. 69] properties in said twenty-two states of the United States was $8,522,822.62, as of the 1st day of July, 1924. That the other 75% of its total properties 95% of which consists of real estate and tangible personalty, is located and had a taxing situs on the 1st day of July, 1924, outside of, and beyond the limits of this State of Kentucky, all of which properties have been duly listed by the said Standard Sanitary Manufacturing Company, with the taxing authorities of every State in which its properties are located, and assessed by said taxing authorities for taxation, and for all purposes as required by the laws of said respective states or political subdivisions of same, and said Company has paid and is now paying all such taxes on same as they

become due. That the foregoing assessed values and taxes do not include any license or franchise tax or income taxes, all of which have also been duly assessed against and paid by said Standard Sanitary Manufacturing Company; that the book value of the said shares of Common Stock of the said Standard Sanitary Manufacturing Company as of the 1st day of July, 1924, was $39.11 per share, and the par value of same was $25.00 per share. That there was no sale of said common stock had or made or reported by newspapers on the 1st day of July, 1924. That said Common Stock is only listed on the stock Exchanges of the Cities of Pittsburgh, Pennsylvania and Louisville, Kentucky.

[fol. 70] That the appellant is a citizen of the State of Kentucky and resides in Louisville, Jefferson County, Kentucky, and was the owner and holder of 591 shares of the said Common Stock of the Standard Sanitary Manufacturing Company, on the 1st day of July, 1924, and duly listed said stock with the Jefferson County Tax Commissioners for taxation as of the 1st day of July, 1924, but claimed the said stock was non-assessable. That the said Jefferson County Tax Commissioner, over the protest and objection of the appellant valued said stock at the rate of $95.00 per share, which valuation was arrived at by him by averaging the sales of small blocks of stock ranging from ten to twenty shares, as reported by the stock reports published in the newspapers of the cities of Louisville and Pittsburgh, as having been made in the week prior to, and the week after the 1st day of July, 1924.

That appellant duly appeared in person, and by counsel, before the Jefferson County Board of Tax Supervisors on being notified of the action of the Jefferson County Tax Commissioner and filed with said Board his written objections and reasons therefor to the aforesaid assessment of his said common stock at $95.00 per share, for, and on behalf of himself and all other holders and owners of said stock, citizens and residents of the State of Kentucky, and who were likewise assessed with their respective holdings [fol. 71] at the same rate of $95.00 per share, on the 12th day of March, 1925, at which time said Board was duly assembled and in session for the purpose of reviewing and

correcting the assessments of persons where same were complained of.

That the appellant requested said Board to be allowed to produce proof to sustain his said objections at that time, or at such other time as said Board might fix. That said Board declined and refused said request and acted thereon as shown by the judgment or order of court herein of March 11, 1925, and sustained the assessment of said common stock as made by the Jefferson County Tax Commissioner at $95.00 per share, to all of which the appellant objected and his objection being overruled, excepted at the time and still excepts.

That during several months prior to July 1st, 1924, rumors were promulgated at the stock exchange of Louisville and Pittsburgh, and among the financial institutions of said cities, that a 40% stock dividend was expected to be declared and paid by the Standard Sanitary Manufacturing Company in the fall of 1924, in addition to the regular cash quarterly dividends theretofore paid of $1.25 per share.

That no stock dividends was declared or paid by said Standard Sanitary Manufacturing Company on its Common Stock during the year 1924; but that a stock dividend of 25% was declared and paid on February 1st, 1925, and [fol. 72] that the average market value of stock in December, 1924, was $117.00.

That in no case has real estate in this State been assessed for taxation purposes at a speculative value due either to the favorable location of same in relation to the trend of business especially in the City of Louisville, or County of Jefferson, or to the pressing need of purchasers paying exhorbitant prices for real estate to round out their holdings.

That during a period of a month prior to the 1st day of July, 1924, and a month after said date, the number of shares of said Common Stock traded in and transferred on the books of the said Standard Sanitary Manufacturing Company was less than 5% of the total issue outstanding at the time.

John P. Haswell, Matt O'Doherty, Attorney- for Plaintiff. J. Matt Chilton, T. M. Glaphin, Jr., Counsel for Defendants.

"Exhibit J. C. K. No. 1."

IN CIRCUIT COURT OF JEFFERSON COUNTY

MINUTE ENTRIES OF RESUBMISSION

At a Court held on the 2nd day of June, 1927.

Upon agreement of counsel for plaintiff and defendant, it is hereby ordered that the order of April 12th, 1927, submitting the above styled case on the demurrers herein and in chief, be set aside, and the appellees be given leave to file answer herein, and that upon the filing of said answer, which is tendered and filed herewith, that this case be re-submitted on the demurrers herein and also upon the [fol. 73] whole case, both as to law and as to facts.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

ANSWER—Filed June 2, 1927

Paragraph I

Comes the appellees and for their answer herein, deny that the 4,591 shares of the Common stock of the Standard Sanitary Manufacturing Company, owned by Junius C. Klein on July 1, 1924, or any of the shares in said company owned by the said Klein, or any of the other stockholders [fol. 74] at said time in said company, were illegally assessed by the Tax Commissioner of Jefferson County or by the defendants herein for State and County taxes for the year 1925; and deny that the assesment made on said shares by the said Tax Commissioner and the defendants as of July 1, 1924 for the said 1915 taxes was null and void and contrary to the provisions of Section 171 of the Constitution of the Commonwealth of Kentucky and to the 14th Amendment, Section 1 of the Federal Constitution.

Paragraph II

The defendants further deny that the sail assessment constitutes double taxation within the meaning of the Constitution of Kentucky or of the Federal Constitution; and deny that it is, therefore, null and void.

### Paragraph III

The defendants further deny that the said assessments herein complained of are greatly in excess of the fair cash value of the said shares of stock estimated at what they would bring at a fair voluntary sale on July 1, 1924; and deny that it is a well known and recognized fact, and deny that it is a fact, that real estate in Jefferson County and in the State of Kentucky is not and has not been assessed at its full value for taxation purposes on July 1, 1924, for 1925 taxes.

Wherefore the appellees ask that the appellants' appeal be dismissed and for their costs herein expended and for [fol. 75] all other relief to which they may be entitled.

J. Matt Chilton, T. M. Galphin, Jr., Counsel for Appellees.

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In Circuit Court of Jefferson County

Minute Entries of Reallotment, etc.

At the Court held on the 22nd day of March, 1928.

At the request of the Hon. Henry S. Barker, Judge of this division of the Court, it is ordered, that this action be, and is reallotted to one of the other Divisions of the Common Pleas Branch of this Court.

On the 22nd of March, 1928, an allotment was held by the Clerk and this action was assigned to Common Pleas Branch, First Division.

At a Court held on the 30th lay of March, 1928.

It is ordered by the Court that Harris W. Coleman, County Attorney of Jefferson County, Kentucky, be, and he is hereby given leave to withdraw the original record in this action from the office of the Clerk of the Jefferson Circuit Court for the purpose of taking same to Frankfort, [fol. 76] Kentucky, to be examined by the Attorney General of the State herein.

At a Court held on the 21st day of April, 1928.

Came plaintiff by counsel, in writing filed, and moved the Court to state in writing its conclusion of fact found separately from the conclusions of law.

The Court returned separate findings of law and facts, which is ordered to be and is filed and made a part of the record herein.

Came defendants by counsel and filed a written notice herein.

Came defendants by counsel in writing filed, and moved the Court to set aside the submission of this action for the purpose of taking additional proof, to which the plaintiff objects.

The Court being advised, ordered said motion be and it is overruled, to which the defendants except.

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[fol. 77] In Circuit Court of Jefferson County

[Title omitted]

Motion to State Conclusion of Fact Separately from Conclusions of Law—Filed April 21, 1928

This action having been submitted to the Court upon the law and facts, now comes the appellant and plaintiff and moves the Court to state in writing the conclusion of fact found separately from the conclusions of law.

John P. Haswell, Matt O'Doherty, Attorneys for Appellant and Plaintiff, Junius C. Klein.

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[fol. 78] In Circuit Court of Jefferson County

[Title omitted]

Separate Findings of Law and Facts—Filed April 21, 1928

This case having been submitted on the law and the facts, the pleadings, exhibits, and the stipulations filed herein, and the deposition of Ben Marshall; Now the Court being fully advised, finds the facts in the case are as shown by the said stipulations filed herein by agreement of parties, on April 12th, 1927:

Stipulations

"It is hereby agreed by counsel for appellant and by counsel for appellees that the following stipulations of facts

shall be considered as conclusive evidence of said facts at the trial of this action subject alone to competency and relevancy.

[fol. 79] That the Standard Sanitary Manufacturing Company is a foreign corporation organized under, and by virtue of the laws of the State of New Jersey, and is duly authorized to do business in this State, and was so doing business in this State of Kentucky on the 1st day of July, 1924.

That it had issued and outstanding on the 1st day of July, 1924, 805,106 shares of Common Stock, of which number 202,083 shares were held and owned by 1,028 persons, citizens and residents of, and domiciled in this State of Kentucky, on said 1st day of July, 1924, and all of whom have been assessed for 1925 State taxes on their respective holdings at the rate of $95.00 per share.

That the total number of preferred shares of said company issued and outstanding on said 1st day of July, 1924, was 46,667 shares of which number 16,680 shares are held and owned by persons citizens and residents of the State of Kentucky.

That said stockholders residing in Kentucky, own and hold in round figures, twenty-five per cent (25%) of the total issue of said Common Stock and thirty-three per cent (33%) of the total issue of said preferred stock.

That said Standard Sanitary Manufacturing Company, on the 1st day of July, 1924, held and owned properties and assets consisting of real estate and tangible personalty, [fol. 80] located in Jefferson County, State of Kentucky, all of which was acquired and held by it for corporate purposes and all of which has been fully listed by said Company for assessment for 1925, State, County, City of Louisville Taxes and for all other purposes, and duly assessed boty by the Jefferson County Board of Tax Supervisors for State taxes for the year 1925, and for all other purposes, at a total value of $2,263,390, which was its fair cash value estimated at the price it would bring at a fair voluntary sale, and which is over twenty-five per cent (25%) the total assessed value of its total properties in twenty-two states of the United States of America, in which states the Standard Sanitary Manufacturing Company has its properties and was doing business as of the 1st day of July,

1924; that the total assessed value of all of the said Standard Sanitary Manufacturing Company's assets and properties in said twenty-two "states of the United States was $8,522,822.62, as of the 1st day of July, 1924. That the other 75% of its total properties, 85% of which consists of real estate and tangible personalty, is located and has a taxing situs on the 1st day of July, 1924, outside of, and beyond the limits of this State of Kentucky, all which properties have been duly listed by the said Standard Sanitary Manufacturing Company, with the taxing authorities of every State in which its properties are located, and assessed by said taxing authorities for taxation, and for all purposes as required by the laws of said respective states or political subdivisions of same, and said Company has paid and is [fol. 81] now paying all such taxes on same as they become due. That the foregoing assessed values and taxes do not include any license or franchise tax or income taxes, all of which have also been duly assessed against and paid by said Standard Sanitary Manufacturing Company; that the book value of the said shares of Common Stock of the said Standard Sanitary Manufacturing Company as of the 1st day of July, 1924, was $39.11 per share, and the par value of same was $25.00 per share. That there was no sale of said common stock had or made or reported by newspapers on the 1st day of July, 1924. That said Common Stock is only listed on the Stock Exchanges of the cities of Pittsburg, Pennsylvania, and Louisville, Kentucky.

That the appellant is a citizen of the State of Kentucky, and resides in Louisville, Jefferson County, Kentucky, and was the owner and holder of 4,591 shares of the said Common Stock of the Standard Sanitary Manufacturing Company, on the 1st day of July, 1924, and duly listed said stock with the Jefferson County Tax Commissioners for taxation as of the 1st day of July, 1924, but claimed the said stock was non-assessable. That the said Jefferson County Tax Commissioner, over the protest and objection of the appellant valued said stock at the rate of $95.00 per share, which valuation was arrived at by him by averaging the sales of small blocks of stock ranging from ten to twenty shares, as reported "by the stock reports published in the newspapers of the cities of Louisville and Pittsburgh, as having been made in the week prior to and the week after the 1st day [fol. 82] of July, 1924."

That appellant duly appeared in person, and by counsel, before the Jefferson County Board of Tax Supervisors on being notified of the action of the Jefferson County Tax Commissioner and filed with said Board his written objections and reasons therefor to the aforesaid assessment of his said common stock at $95.00 per share, for, and on behalf of himself and all other holders and owners of said stock, citizens and residents of the State of Kentucky, and who were likewise assessed with their respective holdings at the same rate of $95.00 per share, on the 12th day of March, 1925, at which time said Board was duly assembled and in session for the purpose of reviewing and correcting the assessments of persons where same were complained of.

That appellant requested said Board to be allowed to produce proof to sustain his said objections at that time, or at such other time as said Board might fix. That said board declined and refused said request and acted thereon as shown by the judgment or order of Court herein of March 11, 1925, and sustained the assessment of said common stock as made by the Jefferson County Tax Commissioner at $95.00 per share, to all of which the appellant objected and his objection being overruled excepted at the time and still excepts.

That during several months prior to July 1st, 1924, rumors were promulgated at the stock exchange of Louis- [fol. 83] ville and Pittsburgh, and among the financial institutions of said cities, that a 40% stock dividend was expected to be declared and paid by the Standard Sanitary Manufacturing Company in the fall of 1924, in addition to the regular cash quarterly dividends therefore paid at $1.25 per share.

That no stock dividend was declared or paid by said Standard Manufacturing Company on its Common Stock during the year 1924; but that a stock dividend of 25% was declared and paid on February 1st, 1925, and that the average market value of stock in December, 1924, was $117.00.

That in no case has real estate in this state been assessed for taxation purposes at a speculative value due either to the favorable location of same in relation to the trend of business especially in the City of Louisville, or County of Jefferson, or to the pressing need of purchasers paying exorbitant prices for real estate to round out their holdings.

That during a period of a month prior to the 1st day of July, 1924, and a month after said date, the number of shares of said Common Stock traded in and transferred on the books of the said Standard Sanitary Manufacturing Company was less than 5% of the total issue outstanding at the time."

The Court further finds that the only other fact presented in the case is contained in the deposition of Ben Marshall, Secretary of the State Tax Commission of the State of Kentucky, which fact the Court finds to be that the assessment of real estate by the assessing authorities of the State of Kentucky, in the County of Jefferson, State of [fol. 84] Kentucky, for the year 1925 as of July 1, 1924, was had and made on a basis of 69.9 per cent of its fair cash value, estimated at what it would bring at a fair voluntary sale thereof, and that the ratio, or average, of the assessments for taxation of real estate in all of the counties of the State of Kentucky, for said year 1924, was between 65% and 70% of the fair cash values of same.

The Court further finds as conclusions of law based on the above facts, that the assessments had and made by the Jefferson County Tax Commissioner of the shares of stock of the Standard Sanitary Manufacturing Company held and owned by plaintiff, Junius C. Klein, and all other holders residing in Jefferson County, Kentucky, at a valuation of $95.00 per share for purposes of State taxation for the year 1925, was the full, fair cash value of same, as of the first day of July, 1924, estimated at what it would bring at a fair voluntary sale thereof; and that the assessment of said shares of stock as aforesaid *the* at the same time the Standard Sanitary Manufacturing Company was also assessed for purposes of State taxes for said year 1925, with its real estate and other property, situated in the State of Kentucky, was not double taxation;

The Court further finds that assessment complained of herein of said shares of stock for State purposes, is not null or void and is not contrary to or in violation of the Constitution of the State of Kentucky, or the Constitution of the United States of America.

[fol. 85] The Court further finds that Section 4088 of the Kentucky Statutes under which the above assessment was made, is constitutional and not in violation of the uniform and equal provisions required by the State constitution in

the assessment of properties for taxation purposes, and does not deny to the plaintiff the equal protection of the law. To each and every conclusion of law aforesaid, the appellant and all other holders and owners of said common stock who reside in Jefferson County, Kentucky, object and except.

John B. Baskin, Judge.

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In Circuit Court of Jefferson County

[Title omitted]

Notice of Motion to Set Aside Submission, etc.—Filed April 21, 1928

The plaintiff, Junius C. Klein, and his attorney, Hon Matt O'Doherty, will take notice that on Saturday, April 21st, 1928, at nine A. M. or as soon thereafter as the Court [fol. 86] will hear him, the defendant will move the Hon. Judge Baskin to—

1. Set aside the submission of this case;

2. That defendant be allowed additional opportunity to take proof;

3. That defendant be given leave to further cross-examine Ben Marshall, Secretary of the Kentucky State Tax Commission; and

4. That defendant be permitted to withdraw from the record the stipulations filed herein.

Harris W. Coleman, Attorney for Defendant.

Said foregoing Notice bears the following Sheriff's return on the back thereof, to-wit:

Executed April 20, 1928, by delivering a copy of the within Notice to Matt O'Doherty, attorney for Junius C. Klein.

Aubrey Cossar, S. J. C., by W. H. Wood, D. S.

[fol. 87] In Circuit Court of Jefferson County

[Title omitted.]

Motion to Set Aside Submission, etc.—Filed April 21, 1928

The defendant, by counsel, moves the Court as follows:

(1) That the submission of this cause be set aside.

(2) That the defendant be allowed opportunity to take additional proof herein.

(3) That the defendant be given leave to further cross examine Ben Marshall, Secretary of the Kentucky State Tax Commission.

(4) That the defendant be permitted to withdraw from the record stipulations filed herein on the 12th day of April, 1926.

Harris W. Coleman, Attorney for Defendant.

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In Circuit Court of Jefferson County

Judgment—April 21, 1928

This action having been submitted upon the law and the facts, the pleadings, exhibits, evidence, stipulations filed herein and the deposition of Ben Marshall, it is now [fol. 88] ordered and adjudged by the Court that the action of the Jefferson County Board of Tax Supervisors in fixing and assessing for taxation for State purposes for the year 1925, of the common stock of the Standard Sanitary Manufacturing Company held and owned by the appellant and all other holders and owners of said stock residing in Jefferson County, Kentucky, at a valuation of $95.00 per share be and the same is hereby sustained; and it is further ordered and adjudged by the Court that said valuation at $95.00 per share of the common stock of the Standard Sanitary Manufacturing Company is its fair cash value estimated at the price it would bring at a fair and voluntary sale thereof as of the First day of July, 1924.

It is further ordered and adjudged by the Court that the appeal be and the same is hereby dismissed. To all of which appellant and all the other holders and owners of said common stock who reside in Jefferson County, Kentucky, object and except.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

MINUTE ENTRIES OF ORDER DENYING NEW TRIAL, ETC.

At a Court held on the 23rd day of April, 1928.

Came plaintiffs by counsel and moved the Court to set aside the judgment entered herein and grant him a new trial and filed grounds in support of said motion herein.

The Court being advised, ordered that the motion of plaintiffs for a new trial herein be and it is overruled, to [fol. 89] which the plaintiffs except.

It is further ordered by the Court that plaintiffs be and are given 60 days in which to prepare and file a bill of exceptions herein.

Came plaintiffs, by counsel, and prayed an appeal to the Court of Appeals of Kentucky herein.

Ordered by the Court that said appeal be and is hereby granted.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

MOTION AND GROUNDS FOR NEW TRIAL—Filed April 23, 1928

The Appellants, Junius C. Klein, and all other stockholders of the Standard Sanitary Manufacturing Company, Appellants herein, move the Court to set aside the judgment of the Court herein and to grant them a new trial in this case on the following grounds:

[fol. 90] First. Because the judgment of the Court is not supported by the Court's findings of the facts herein, and is contrary thereto and to the evidence;

Second. Because the Court's findings of law herein are not supported by the Court's findings of the facts herein and are contrary thereto;

Third. Because the judgment of the Court is contrary to the law and to the evidence and is not supported by the facts or evidence in the case.

John P. Haswell, Matt O'Doherty, Counsel for Appellants.

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In Circuit Court of Jefferson County

[Title omitted]

Motion for Appeal to Court of Appeals—Filed April 23, 1928

[fol. 91] Came the appellants by counsel and move the Court for an appeal to the Court of Appeals herein.

John P. Haswell, Matt O'Doherty, Counsel for Appellants.

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In Circuit Court of Jefferson County

Minute Entries of Order Settling Bill of Exceptions, etc.

At a Court held on the 23rd day of May, 1928.

Came plaintiffs by counsel and moved the Court to file their Bill of Exceptions and tender said Bill of Exceptions herein, to which the defendant objects.

Ordered by the Court that said motion be and it is assigned to Thursday, May 24th, 1928, for hearing at 10 A. M.

At a Court held on the 24th day of May, 1928.

Came parties by counsel and the motion of plaintiffs to file their Bill of Exceptions herein, heard by the Court.

The Court being advised, ordered said motion be and is sustained, to which the defendants except.

It is therefore ordered by the Court that said Bill of Exceptions be and is now filed and made a part of the record herein.

[fol. 92] In Circuit Court of Jefferson County

[Title omitted]

Bill of Exceptions—Filed May 24, 1928

Be it remembered that the parties Appellant and Appellee herein, on April 12th, 1927, filed herein the following stipulation in writing ful-y executed by them, agreeing upon and setting forth the facts to be considered by the Court on the final hearing and determination of this case in addition to those established by the deposition of Ben Marshall, Secretary of State Tax Commission, of Kentucky, which said deposition is also read on the trial.

The said stipulation reads as follows:

(Said Stipulation has heretofore been copied into this record as of April 12th, 1927, the day same was filed in Court, and may be found on Pages 53 to 58, inclusive.)

[fol. 93] Also the deposition of Ben Marshall:

(Said Deposition has heretofore been copied into this record as of February 28th, 1927, the day same was filed, and may be found on Pages 49 to 52½, inclusive.)

The foregoing was all and the only evidence heard by the Court or offered by the parties.

On April 21, 1928, the Court rendered judgment herein and filed in writing its separate findings of fact to each of said findings of fact the appellees excepted and conclusions of law as shown by the record, to each of which said conclusions of law the apellants excepted at the time and still except.

Within three days thereafter, on April 23, 1928, the Appellant filed his motion and grounds for new trial, which said Motion and Grounds for New Trial read as follows:

(Said Written Motion and Grounds for New Trial has heretofore been copied into this record as of April 23rd, 1928, the day same was filed in Court, and may be found on Pages 74 to 75, inclusive.)

The Court overruled the said Motion, to which Plaintiffs excepted at the time and still except.

Leave was given to the Appellant to prepare and file a Bill of Exceptions herein, which has been done within the

time allowed, and is now certified to be true and to contain all the facts agreed upon by the parties as set out in their stipulations, and all the evidence heard by the Court. [fols. 94 & 95] In testimony of all which witness the signature of Hon. John B. Baskin, presiding Judge of this Court, this May 24, 1928.

John B. Baskin, Judge.

This Bill is objected to and a hearing thereon is desired.
Harris W. Coleman, County Attorney.

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In Circuit Court of Jefferson County

Order to Transmit Original Exhibit—June 13, 1928

Come the parties hereto by counsel, and by agreement it is ordered by the Court that the original Exhibit "BM#1" filed with the deposition of Ben Marshall may be withdrawn by the Clerk and transmitted with his Transcript of Record to the Court of Appeals of Kentucky.

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Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 96] In Court of Appeals of Kentucky

Junius C. Klein, for Himself and on Behalf of All Other Stockholders of the Standard Sanitary Manufacturing Company Residing in Jefferson County, State of Kentucky, Appellant,

vs.

Jefferson County Board of Tax Supervisers, R. M. Martin, John Keller, E. W. Elliott, Ed Plenge, William C. Fischer, John D. Moore, Walter F. Jacobs, George H. Hinesley, Appellees

Statement of Appeal—Filed Aug. 21, 1928

The appeal in this case is from a judgment of the Jefferson Circuit Court, Common Pleas Branch, First Divi-

sion, rendered April 21st, 1928, and which may be found on pp. 72-73 of the Record.

The appeal was granted in the Court below by Order entered April 23rd, 1928, and which may be found on pp. 73-74 of the record.

Appellees' counsel is Mr. Harris Coleman, County Attorney, Jefferson County, Ky., whose office is 1212 Inter-Southern Building, Louisville, Ky.

The appellant's counsel are Mr. John P. Haswell, office Lincoln Building, Louisville, Ky., and Matt O'Doherty, In-
[fol. 97] ter-Southern Bldg., Louisville, Ky.

(Signed) Matt O'Doherty, John P. Haswell, Counsel for Appellant.

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[fol. 98] In Court of Appeals of Kentucky

Minute Entry of Submission—Sept. 19, 1928

It is ordered that the foregoing case be submitted.

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In Court of Appeals of Kentucky

Junius C. Klein, for Himself, et al., Appellants,

v.

Jefferson County Board of Tax Supervisors et al., Appellees

Appeal from a Judgment of the Jefferson Circuit Court, Common Pleas, First Division

Judgment—June 21, 1929

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants their costs herein expended.

[fol. 99] IN COURT OF APPEALS OF KENTUCKY

JUNIUS C. KLEIN, for Himself, et al., Appellants,

v.

JEFFERSON COUNTY BOARD OF TAX COMMISSIONERS, et al., Appellees

Appeal from Jefferson Circuit Court, Common Pleas, Branch 1

Opinion of the Court by Commissioner Hobson. Affirmed

OPINION—June 21, 1929

Junius Klein in the year 1925 owned a large block of stock in the Standard Sanitary Manufacturing Company. The Assessor in making the assessment for that year valued the stock at $95.00 a share. Klein, and other taxtaxpayers similarly situated, applied to the Board of Supervisors of Tax of Jefferson County for relief from the assessment. The Board refused to modify it. They then appealed to the Jefferson quarterly court. The quarterly [fol. 100] court heard the case and on December 4, 1925, entered a judgment sustaining the action of the assessor and of the Board of Supervisors. Klein appealed to the Jefferson circuit court. The case was finally heard in the Jefferson circuit court on April 2, 1928. The circuit court sustained the judgment of the quarterly court. Klein appeals to this court. The case was submitted on September 19, 1928, but time was given the appellees to file brief and the final briefs were not filed until June 7, 1929. The case was then sent out to the court.

The Standard Sanitary Manufacturing Company is a corporation formed under the laws of the State of New Jersey. It had outstanding in 1925, 805,106 shares of stock of the par value of $25.00. Over three-fourths of the total properties of the corporation are located outside of Kentucky, and a little less than one-fourth is located within the State of Kentucky. The book value of the common stock of the company on December 31, 1924, was $41.93 per share. But the stock was in fact selling in the market for about a hundred dollars per share in July, 1925. In February

1925, it sold as high as $145.00 a share. The corporation paid its taxes in the State of Kentucky. Klein contends: (1) The stockholders cannot be taxed under the Constitution of Kentucky. (2) The assessment at $95.00 a share is not warranted. (3) The assessment is a denial to him of the equal protection of the law under the Fourteenth Amendment of the Constitution of the United States.
[fol. 101] Section 171 of the Constitution provides:

"Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation with the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. The general assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation."

Section 4088, Kentucky Statutes, passed pursuant to this provision of the Constitution provides:

"The individual stockholders of a corporation, at least seventy-five per cent (75%) of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky (including the corporate franchise when the franchise is required to be assessed), provided the shareholder furnishes satisfactory proof to the taxing authorities that at least three-fourths of the total property of such corporation is taxed in Kentucky."

In Shinkle's estate v. Board of Supervisors, 216 Ky. 60, this court thus stated its conclusion under these provisions:

"It seems to be well settled that it is within the legislative power to tax the property of a corporation at its fair cash value, including its franchise, and at the same time [fol. 102] require the stockholders to list and pay taxes upon the shares of stock held by them without violating any of the provisions of our Constitution or of the federal Constitution. Franklin County v. Bank of Frankfort, 87 Ky. 370; McElroy, Sheriff v. Walsh's Trustee, 133 Ky. 113. In the last case above cited the court observed: 'While it is true the state may have taxed the franchise, which includes

the capital of the corporation, and taxed also the shareholder upon his shares, it has not done so.' The principle was well expressed by the Supreme Court of the United States in New Orleans v. Houston, 119 U. S. 265, where it was said: 'It is well settled by the decisions of this court that the property of shareholders in their shares, and the property of the corporation in its capital stock, are distinct property interests, and, where that is the legislative intent clearly expressed, that both may be taxed.' See also Tennessee v. Whitworth, 117 U. S. 129; Bank of Commerce v. Tennessee, 161 U. S. 134; Cooley on Taxation, vol. 1, section 246."

The same question was reconsidered in Silver *b.* Board of Supervisors, 221 Ky. 100, the court again said:

"The Fourteenth Amendment to the federal Constitution is not a protection in all cases against unwise state legislation. It imposes no fixed rule of taxation upon the states. [fol. 103] It protects against such discrimination as amounts to a denial of the equal protection of the law or a deprivation of property without due process of law. There is nothing in that amendment that forbids states enacting laws providing for double taxation so long as the law bears uniformly on all property within the particular class and do not discriminate against one taxpayer in favor of another. It is not double taxation, however, in our judgment, to require the assessment of the property of a corporation as a corporate entity and also require the assessment of the shares of stock of the corporation in the hands of individual holders."

In that case it was contended by Siler that it was a discrimination to require the assessment of shares of stock in the hands of individual holders if the corporation owned less than 75% of its total property in Kentucky, and to exempt the shares of stock in a corporation from assessment where it owned 75% or more of its total property in Kentucky. The court after considering a number of cases rejected this contention in these words:

"After a careful consideration of the facts alleged in appellant's petition and the law applicable thereto, we have reached the conclusion that the action of the board

of supervisors was correct, and that appellant was entitled to no relief from the assessment thus imposed upon him." P. 106.

[fol. 104] Upon re-consideration of the question the court adheres to the conclusion it then reached. Under the Constitution the legislature is expressly authorized to classify property. The classification here made rests upon a reasonable foundation and necessarily in such matters the question must be left to the judgment of the legislature.

Appellant complains that his property is assessed at $95.00 a share when land in Jefferson County is only assessed at about 70% of the average sale value, in voluntary sales. In the classification of property land is placed in one class, corporate stock in another. They are taxed at different rates. Appellant cannot at least complain that property in a different class from his property is assessed too low, unless the inequality is gross or such as to show an unreasonable discrimination. This is not shown. The proof shows that the purchaser of land is generally a person who wants that property and is willing to pay more for it than one who does not need it. Private sales are usually made on credit and people will pay more for property on credit than for cash. The Board of Tax Commissioners, sitting in Louisville and acquainted with local conditions, judged that 70% of the sale values represented about fairly the cash value of real estate. Some weight must be given to their judgment, for after all this is a matter of judgment. On the other hand appellant's stock is valued according to the price it was bringing day by day on the stock market. He does not deny that his stock was [fol. 105] selling at $95.00 a share day by day. There is no better way of fixing the actual cash value of a thing than the average of such daily sales for cash. The Constitution of the state requires that all property shall be assessed at its fair cash value, at voluntary sale. The court is unable to see, therefore, that appellant is entitled to any relief under the Constitution of Kentucky.

He earnestly insists that he is denied by the statute the equal protection of the law and relies on the case of Louisville Gas Co. v. Coleman, 276 U. S. 32. In that case the supreme court reversed this court and held that the statute

taxing mortgages running over five years and not taxing mortgages running five years or less was invalid, on the ground that the classification was arbitrary. It is insisted that the same rule should be applied here. But the court is unable to see that it has any application. That case seems to rest upon the idea that long time mortgages are made by corporations and short time mortgages are made by the poor whose credit is not good, and that the statute taxed the corporations and exempted from taxation individuals. But there are no such facts here. All corporations and all individuals are treated exactly alike on the same state of facts. There is a substantial reason for putting stockholders in corporations not paying taxes in Kentucky on so much of their property on a different footing from those so paying taxes in Kentucky. When the corporation's property is all in Kentucky and its property is all assessed and the taxes are paid thereon, the property so taxed has in fact borne its fair share of the public burden. Not to assess the stockholders on his stock then is simply to treat the corporation as a firm is treated. But the legislature perceived that to do justice a line must be [fol. 106] drawn; for if 1 per cent of the property of the corporation was not assessed, injustice would be done to assess the stockholder, so to do substantial justice the legislature fixed 75% as the basis. But a large part of the property in any state is never assessed at its fair value. This known of all men, and so the legislature when it came to consider whether stockholders in corporations should be taxed, where the corporation had paid taxes on all its property, did not require that the taxes should be paid by the corporation upon 100% of its property, but fixed a basis of 75%. The reason was to allow a margin. It was an effort to put everybody upon equality, and not to require the stockholders to pay when the corporation had paid on an assessment of its property as large as that of much of the property in the state. The act of the legislature is simply an effort to approximate justice by a classification resting on reasonable grounds, which are familiar to anyone who knows anything of the assessment of property in the state. The classification which the legislature made was not in the interest of the poor man or against the corporation. By the statute in force for many

years, the stockholder was not taxed on his stock if the corporation paid the taxes on its property and its franchise tax, See Kentucky Statutes 1903, Secs. 4085, 4088. Perceiving that this was unjust where the corporation only paid taxes on a small part of its property, the legislature amended the statute so as to make it only applicable when the corporation paid taxes in Kentucky on one-fourth of its property Kentucky Statutes 1922, Sec. 4088. Considering [fol. 107] that much property in the state was thus escaping taxation when the corporation paid taxes here on only one-fourth of its property and the stockholders were not taxed on their stock, the legislature again amended the statute and put it in the form above quoted. It was realized that a reasonable line should be drawn; a small deficiency should not defeat the statute. The stockholder should not be taxed if the corporation was in substance paying taxes in Kentucky on all its property. The allowance of a margin of ten per cent plainly would not have been unreasonable. The allowance of twenty-five per cent was equally plainly a reasonable effort to do justice to all in view of the way all our other assessments are made.

Appellant's property is taxed just like all other property, and that the stock of stockholders in corporations paying taxes on more than seventy-five per cent of their property is not taxed, is of no more concern to him than to every other taxpayer in the state. The question here presented is whether appellant was properly taxed. In Hart Refineries v. Harman, U. S. Advance Sheets, March 1, 1929, p. 240, the United States Supreme Court, citing a number of previous cases, said this:

"But because the state legislature could have laid a tax upon the use of the commodity as well as upon its sale, it by no means follows that a failure to do so constituted a discrimination forbidden by the equal protection clause of the 14th Amendment. That clause does not prohibit classification; and the power of the state to classify for [fol. 108] purposes of taxation is of wide range and flexibility, provided that the classification rest upon a substantial difference so that all persons similarly circumstanced will be treated alike. Statutes which tax one class of property while exempting another class necessarily result in

imposing a greater burden upon the property taxed then would be the case if the omitted property were included. But such statutes do not create an inequality in the constitutional sense. Not is the imposition of an excise tax upon one occupation or one activity from which other and different occupations or activities are exempt, a denial of equal protection. It is enough if all in the same class are included and treated alike. These propositions are so firmly established by repeated decisions of this court that further discussion is unnecessary."

This seems to the court to apply equally well here. In the making of a classification a line must be drawn somewhere. In the following cases statutes were sustained making classifications similar to that here: A statute fixing the rates of fare on railroads according to their length, 15 miles, from 15 to 75 miles, over 75 miles. Dow v. Beidelman, 125 U. S. 680. A statute permitting railroads less than 50 miles in length to heat passenger cars by stove or [fol. 109] furnace or to operate trains without a complete crew, New York & C. Railroad Co. v. N. Y. 165 U. S. 628, Chicago, & C. R. R. Co. v. Ark. 219 U. S. 453. A statute providing for inspection in mines employing six men or more, but not to those employing five, or requiring screens where then men were employed. Consolidated Coal Co. v. Illinois, 185 U. S. 203, McLean v. Ark. 211 U. S. 539. A statute requiring a wash room at the request of 20 employees, but not where only 19 requested. Booth v. Indiana, 237 U. S. 391. The same rule was allied to Workmen's Compensation laws which only apply to employers of certain number of men. Jeffry Manufacturing Co. v. Blagg, 235 U. S. 571, and to fire inspection laws applicable to hotels having 50 rooms. Miller v. Strahl, 239 U. S. 426, or to the herding of sheep within two miles of a dwelling house, Bacon v. Walker, 204 Ky. 311, or exempting banks whose transactions average $500.00 or more, Engel v. L'Malley, 219 U. S. 128. Any number of similar cases might be cited. In Citizens Telephone Co. v. Fuller, 229 U. S. 322, the court thus stated the rule:

"Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great

or conspicuous. Keeney v. New York, 222 U. S. 536, 56 L. Ed. 305, 38 L. R. A. (N. S.) 1139, 32 Sup. Ct. Rep. 105. The state is not bound by any rigid equality. This is the rule; its limitation is that is must not be exercised in 'clear and hostile discriminations between particular persons and [fol. 110] classes.' See Quong v. Kirkendall, 223 U. S. 59, 62, 63, 56 L. ed. 350-352, 32 Sup. Ct. Rep. 192. Thus defined and thus limited, it is a vital principle, giving to government freedom to meet its exigencies, not binding its action by rigid formulas, but apportioning its burdens, and permitting it to make those 'discriminations which the best interests of society require.' "

The classification made by the legislature is just, and reasonable and is clearly such a discrimination as the best interests of society requires.

Where the legislature has classified property, taxes must be uniform on each class of property, but the taxes on the different classes are not required to be uniform; for this is the purpose of classification. Under the statute appellants' stock pays only state taxes on its assessment and is exempt from all local or municipal taxation, which amounts to much more than the state taxes, a burden that real estate bears, so on the whole case it appears to the court that he can not complain that he is denied the equal protection of the law, or that injustice has been done to him. Under the power to classify property, the legislature is not required to put all stockholders in one class, but may make a reasonable classification of stockholders. The classification placing those in one class where the corporation has paid taxes in Kentucky on 75% of its property and those in another class where the corporation has paid taxes in Kentucky on less than 75% of its property rests on reasonable grounds. Appellant cannot complain that land in Jefferson county is equalized at 70%; for land is equalized [fols. 111 & 112] in each county by the county board because land values depend on local conditions; but intangible property is equalized by the state board and is uniform throughout the state. Siler v. Board of Supervisors, 221 Ky. 102.

Judgment affirmed.

RB.

[fol. 113] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Sept. 14, 1929

Now comes Junius C. Klein, plaintiff in error in the above entitled cause, and in connection with his petition for an appeal or writ of error in this cause assigns the following errors, which plaintiff in error avers occurred on the trial thereof and upon which he relies to reverse the judgment entered herein as appears of record:

1. The Court of Appeals of Kentucky erred in affirming the judgment of the Jefferson Circuit Court sustaining the demurrer to plaintiff in error's petition, filed in this cause and dismissing plaintiff in error's petition.

2. The Court erred in overruling plaintiff in error's contention that the Statute in question, Section 4088, Kentucky Statutes, as amended by Acts of 1924 was in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in holding that no right secured to the plaintiff by the Fourteenth Amendment to the Constitution of the United States was violated by the imposition by the defendants of the assessment complained of.

4. The Court erred in holding and adjudging that the plaintiff was not by the assessment complained of deprived of its property without due process of law.

[fols. 114 & 115] 5. The Court erred in holding that Section 4088, Kentucky Statutes, (Carroll's 1922 edition) as amended by chapter 116, page 402, section 2, of the Acts of 1924 of the General Assembly of Kentucky, was not in conflict with or in violation of the Fourteenth Amendment to the Constitution of the United States.

6. The Court erred in holding that said Section 4088, Kentucky Statutes was not in conflict with sections 170, 171 and 172 of the Constitution of the State of Kentucky.

Wherefore the appellant prays that the said judgement be reversed and that the said Court of Appeals of Kentucky be ordered to enter a judgement reversing the judgement

of the Jefferson Circuit Court, appealed from by the appellant to the said Court of Appeals of Kentucky, and directing the said Jefferson Circuit Court to enter judgement in appellant's favor, setting aside said judgement heretofore entered dismissing the plaintiff's petition and directing it to overrule the demurrer to said petition, and to hold the assessment complained of to be null and void and of no force and effect.

(Signed) Homer W. Batson, Attorneys for Appellant.

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[fol. 116] In Circuit Court of Appeals of Kentucky

[Title omitted]

Petition for Appeal—Sept. 14, 1929

To Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Now comes Junius C. Klein, plaintiff in error, in the above cause and would show unto this honorable court that in the record and proceeding and rendition of the decree in the above cause by the Court of Appeals of the State of Kentucky, it being the highest court of said state in which a decision could be had on the said suit between Junius C. Klein and the Board of Tax Supervisors of Jefferson County, Kentucky, manifest error has occurred greatly to his damage, whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question the validity of Section 4088, Kentucky Statutes (Carroll's edition 1920) as amended by Act of General Assembly of Kentucky of March 4, 1924, being Chapter 116, page 402, Section 2, of the Acts of the General Assembly of Kentucky of 1924, which it is claimed is repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States in that it denies to the plaintiff in error the equal protection of the laws and discriminates against the plaintiff in error one of a class of taxpayers and in favor of another class of taxpayers and that it deprives plaintiff in error of his property without due process of law and the decision in

said court was in favor of the validity of said statute, all of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of [fols. 117 & 118] errors filed herewith.

Wherefore petitioner prays that his appeal be allowed and that a transcript of the record, proceedings and papers upon which said orders were made duly authenticated be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of said court in such cases, made and provided that the same may be inspected and corrected as according to law and justice should be done.

(Signed) Homer W. Batson, Counsel for Plaintiff in Error.

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[fols. 119 & 120] In Court of Appeals of Kentucky

[Title omitted]

Order Allowing Appeal to Supreme Court of United States—Filed Sept. 14, 1929

On this the 14th day of September, 1929, came on to be heard the application of Junius C. Klein, appellant, said appellant being represented by counsel, for an appeal or writ of error and it appearing to the court from the petition filed herein and the record filed therewith that the application ought to be granted and that a transcript of the record and proceedings and papers upon which the judgment of the court was rendered, properly certified, should be sent to the Supreme Court of the United States as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is therefore ordered that the appeal or writ of error be allowed upon the appellant giving bond, conditioned as the law directs, in the sum of $2,500.00, and that a true copy of the record, assignment of errors and all proceedings had in the case in the Court of Appeals of Kentucky shall be transmitted to the Supreme Court of the United States, properly certified as the law directs; that the said

court may inspect the same and do what according to law should be done.

D. A. McCandliss, Chief Justice of Court of Appeals of Kentucky.

[File endorsement omitted.]

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[fols. 121-123] Bond on appeal for $2,500, approved and filed Sept. 14, 1929, omitted in printing.

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[fol. 124] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Sept 14, 1929

To the Clerk of the Court of Appeals of Kentucky:

The appellant and Plaintiff in Error, Junius C. Klein, having been awarded a writ of error herein by the Supreme Court of the United States to the Court of Appeals of Kentucky, desires the entire record herein, together with all exhibits, orders and judgments, to be copied and incorporated in the transcript for the use of the Supreme Court of the United States upon said Writ of Error.

(Signed) Homer W. Batson, Attorney for Appellant.

Notice accepted and service waived. (Signed) J. W. Cammack, Attorney General.

[File endorsement omitted.]

[fols. 125 & 126] Citation, in usual form, and waiver, filed September 14, 1929, omitted in printing.

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[fol. 127] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 128] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Oct. 26, 1929

Comes now the plaintiff-in-error, Junius C. Klein, for himself and on behalf of all other stockholders of the Standard Sanitary Manufacturing Company, residing in Jefferson County, State of Kentucky, in the above entitled cause, and states that the points upon which he intends to rely in this court and in this case are as follows:

Point I. Kentucky Statutes Section 4088, as amended by the Acts of 1924, in making a distinction for purposes of taxation between shares of stock in corporations which have 75% or more of their total property within the State of Kentucky, and shares of stock in corporations which have less than 75% of their total property within the State of Kentucky, makes an unreasonable, arbitrary and illegal classificafion of corporate stock for purposes of taxation, and said Section of the Kentucky Statutes, as amended, is, therefore, in conflict with, and in violation of, the Fourteenth Amendment to the Constitution of the United States; and the Kentucky Court of Appeals erred in not finding and holding that said classification made by said Statute is [fol. 129] unreasonable, arbitrary and illegal, and in conflict with, and in violation of, the Fourteenth Amendment to the Constitution of the United States.

Point 2. Kentucky Statutes Section 4088, as amended by the Acts of 1924, discriminate against the holder of stock in a corporation having less than 75% of its total property within the State of Kentucky, and in favor of the holder of stock in a corporation which has 75% or more of its total property within the State of Kentucky, thus denying to the holder of the former class of stock the equal protection of the laws enjoined by the Fourteenth Amendment to the Constitution of the United States; and the Kentucky Court of Appeals erred in not finding and holding that the classification made by Kentucky Statutes Section 4088 as amended, does not deny to the holder of the former class of stock the equal protection of the laws enjoined by the Fourteenth Amendment to the Constitution of the United States.

Point 3. Kentucky Statutes Section 4088, as amended by the Acts of 1924, in making a distinction for purposes of taxation between shares of stock in corporations having 75% or more of their total property in the State of Kentucky, and shares of stock in corporations having less than 75% of their total property in the State of Kentucky, and subjecting to assessment and taxation the latter class of stock, taxes in Kentucky the property of the holder of stock in corporations having less than 75% of their total property in Kentucky, and property of the appellant and plaintiff-in-error, and of all other stockholders of the Standard Sanitary Manufacturing Co., residing in Jefferson County, State of Kentucky, which is located outside the State of Kentucky and is subject to taxation elsewhere, and which has been duly assessed, and upon which all taxes, both property and franchise, have been paid in the respective States where said property is located, and said Section 4088 [fol. 130] of the Kentucky Statutes as amended, on that account violates the Fourteenth Amendment to the Constitution of the United States; and the Kentucky Court of Appeals erred in not finding and holding that on account of such taxation in Kentucky of property located outside the State of Kentucky said Section is in violation of the Fourteenth Amendment to the Constitution of the United States.

Point 4. Kentucky Statutes Section 4088, as amended by the Acts of 1924, in making a classification for the purpose of taxation between shares of stock in a corporation having 75% or more of its total property in the State of Kentucky, and shares of stock in corporations having less than 75% of its total property in the State of Kentucky, adopts the policy of avoiding double taxation of property in corporations, all or 75% of whose property is in the State of Kentucky, and provides for double taxation of the property of corporations having less than 75% of their property in the State of Kentucky, both as to the property located within the State of Kentucky and the property located outside the State of Kentucky, and by such double taxation of the property of such corporations said Section 4088 as amended, violates the Fourteenth Amendment to the Constitution of the United States; and the Kentucky Court of Appeals erred in not finding and holding that on account

of the double taxation provided by said Statute, said Section as amended is in violation of the Fourteenth Amendment to the Constitution of the United States.

Point 5. Kentucky Statutes Section 4088, as amended by the Acts of 1924, is not subjecting to taxation stock in a corporation having 75% or more of its total property within the State of Kentucky, and in providing for taxation of stock in a corporation having less than 75% of its total property within the State of Kentucky, is in conflict with [fol. 131] Sections 170, 171 and 172 of the Constitution of the State of Kentucky; and the Kentucky Court of Appeals erred in not holding that said Section as amended is in conflict with Sections 170, 171 and 172 of the Constitution of the State of Kentucky.

Point 6. The defendants-in-error, acting as the Board of Tax Supervisors of Jefferson County, Kentucky, have, in assessing the plaintiff-in-error's property, and the property of all other stockholders of the Standard Sanitary Manufacturing Company, residing in Jefferson County, State of Kentucky, in excess of its fair cash value as shown by the uncontradicted evidence of the real value of such stock, deprived the plaintiff-in-error and said other stockholders, of their property in violation of the rights secured to him and them by the Fourteenth Amendment to the Constitution of the United States; and the Kentucky Court of Appeals erred in not finding and holding that said assessment deprived the plaintiff-in-error and said other stockholders of their property in violation of the rights secured to him and them by the Fourteenth Amendment to the Constitution of the United States.

Point 7. The defendants-in-error, acting as the Board of Tax Supervisors of Jefferson County, Kentucky, have, in assessing the plaintiff-in-error's property, and the property of all other stockholders of the Standard Sanitary Manufacturing Company, residing in Jefferson County, State of Kentucky, on a much higher pro rata basis (approximately 100%) of its fair cash value than they assessed real estate (69.9% of its fair cash value) within the same county for the same year, and upon a much higher pro rata basis than real estate was assessed in all counties of the State of Kentucky for said year (65 to 70% of its fair cash value), denied

to the plaintiff-in-error and to said other stockholders the [fol. 132] equal protection of the law guaranteed to him and them by the Fourteenth Amendment to the Constitution of the United States; and the Kentucky Court of Appeals erred in not finding and holding that said assessment denied to the plaintiff-in-error and said other stockholders the equal protection of the law guaranteed to him and them by the Fourteenth Amendment to the Constitution of the United States.

Point 8. The Kentucky Court of Appeals erred in holding that no right secured to the plaintiff by the Fourteenth Amendment to the Constitution of the United States was violated by the imposition by the defendants upon the appellant and plaintiff-in-error, and upon all other stockholders of the Standard Sanitary Manufacturing Company, residing in Jefferson County, State of Kentucky, the assessment of stock complained of in this action.

Point 9. The Kentucky Court of Appeals erred in holding and adjudging that the appellant and plaintiff-in-error, and other stockholders of the Standard Sanitary Manufacturing Company, residing in Jefferson County, State of Kentucky, were not, by the assessment complained of, deprived of their property without due process of law, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Point 10. The Kentucky Court of Appeals erred in finding and holding that the defendants-in-error did not by the assessment of the stock of the appellant and plaintiff-in-error and of all other stockholders of the Standard Sanitary Manufacturing Company, residing in Jefferson County, State of Kentucky, upon a different pro rata basis of the actual value, violate Sections 171, 172 and 174 of the Kentucky Constitution.

And the plaintiff-in-error further states that the whole of [fols. 133 & 134] the record, as filed, is necessary for the consideration of the above points.

Homer W. Batson, Edmund F. Trabue, Blakey Helm, Counsel for Plaintiff-in-error.

Received two copies Oct. 24, 1929. Samuel B. Kirby, Jr., Asst.-Atty. Gen'l of Ky., for Dept. in Error.

[fol. 135] Acknowledgment is made of the receipt of two copies of the Statement of points to be relied upon and designation of the parts of the record to be printed, to be filed by the plaintiff-in-error.

Samuel B. Kirby, Jr., Asst. Atty. Genl. of Ky. Attorney for Defendant-in-error.

[fol. 136] [File endorsement omitted.]

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Endorsed on cover: File No. 34,573. Kentucky Court of Appeals. Term No. 442. Junius C. Klein, appellant, vs. Board of Tax Supervisors of Jefferson County, Kentucky. Filed October 14, 1929. Filed No. 34,573.

FILE COPY

FILED
NOV 11 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1929.

No. 11

---

JUNIUS C. KLEIN, ETC., - - - - - - *Appellants,*

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - *Appellees.*

---

## PRINTED STATEMENT COMPLYING WITH RULE 12 OF THE COURT.

---

EDMUND F. TRABUE,
*Counsel for Appellants.*

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1929.

No. 442.

---

JUNIUS C. KLEIN, ETC., - - - - - - *Appellants,*

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - *Appellees.*

---

## PRINTED STATEMENT COMPLYING WITH RULE 12 OF THE COURT.

---

A. The statutory provision which sustains the jurisdiction of this Court in U. S. Code, Title 28, Section 344 (Judicial Code, Section 237, Paragraph A), providing for jurisdiction of the Supreme Court where the validity of the Statute of the State of Kentucky (Ky. Stat., Sec. 4088) is drawn in question as being repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision of the highest Court of the State of Kentucky was in favor of the validity of the Statute.

B. The judgment of the State Court was rendered on the 21st day of June, 1929, and is found on page 91

of the Transcript filed in this Court on October 14, 1929, printed record, page ; and the date on which the application for appeal was presented was the 14th day of September, 1929, and is found on page 116 of the Transcript and page of the printed record.

C. The nature of the case is an assessment by the taxing authorities of Jefferson County, State of Kentucky, of shares of the capital stock of the Standard Sanitary Manufacturing Company held by appellant, Junius C. Klein, and others, residents of Jefferson County aforesaid, as of July 1, 1924, assessed as required by Carroll's Kentucky Statutes, 1922, Section 4088, and appeals from the action of the Jefferson County Board of Tax Supervisors sustaining such assessment to the Jefferson Quarterly Court, and from the action of such Court affirming the action of said Board to the Jefferson Circuit Court, and from the judgment of said Court to the Court of Appeals of Kentucky, upon the ground that taxation of said shares of capital stock held by appellant and said others denied to them the equal protection of the laws and due process of law required and enjoined by the Fourteenth Amendment to the Constitution of the United States, and arbitrarily discriminated against them in violation of said amendment to said Constitution; and that the assessment of said shares of stock as made by said taxing authorities denies to the appellant and to all other stockholders of said corporation the equal protection of the laws and due process of law required and enjoined by the Fourteenth Amendment to the Con-

stitution of the United States, and arbitrarily discriminated against them in violation of said amendment to said Constitution, all of which appears in the Statement of Points filed in this Court on the 26th day of October, 1929.

The points aforesaid upon which the jurisdiction of this Court is based were made by appellant in his pleadings or statements in the Jefferson Quarterly Court, the Jefferson Circuit Court, and the Court of Appeals of Kentucky, as appears in the Transcript, pages , printed record, pages .

D. Among the many cases believed to sustain the jurisdiction of this Court are:

Louisville Gas & Elec. Co. v. Coleman, Auditor, 277 U. S. 32;
Northern Pacific Ry. Co. v. Department of Public Works, *et al.*, 268 U. S. 39;
Love v. Griffith, 266 U. S. 32;
Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499;
Consolidated Turnpike Co. v. Norfolk & Ocean Ry. Co., 228 U. S. 326.

EDMUND F. TRABUE,
*Counsel for Appellants.*

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DEC 5 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1929.

No. [redacted] 11

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JUNIUS C. KLEIN, ETC., - - - - - - *Appellants,*

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - *Appellees.*

---

## APPENDIX, OR EXHIBIT, WITH THE PRINTED STATEMENT COMPLYING WITH RULE 12 OF THE COURT.

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The Kentucky Statutes providing for the procedure on assessment and appeals, described on *page 2, item C*, are as follows:

*Section 4123. Reconvening to hear complaints; witnesses.*

"The board, in reassembling, shall hear all complaints and pass upon the assessment of all taxpayers, and for that purpose the board, in counties having therein a city of the first or second class, shall remain in session not less than one nor more than ten days, and in other counties not less than

one nor more than five days. The board may summon and swear witnesses and require them to testify. Any person who shall wilfully fail to obey the summons of the board or shall refuse to testify before it when required shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than twenty five dollars ($25.00) nor more than one hundred dollars ($100.00) for each offense" (*Id.*, Sec. 9, as amd. April 11, 1917, c. 1., p. 3, Sec. 27).

*Section 4128. Errors do not invalidate assessment; appeal.*

"Any informality or irregularity in the execution of their duties as supervisors and any failure of duty on their part shall not render any assessment invalid. But any taxpayer feeling himself aggrieved by the action of said board of supervisors may appeal to the quarterly court within thirty days after the final adjournment of said board by filing with the judge of said court a certified copy under the hand of the clerk of said board of the action of said board. He shall have the right to appeal from the decision of the quarterly court to the circuit court and then to the court of appeals in the same manner that the law now allows appeals in civil cases. It shall be the duty of the county attorney to represent the board in all such suits pending before the quarterly or circuit court, and it shall be the duty of the attorney general to represent the board in the court of appeals. When any such appeal is taken it shall be the duty of the county attorney to forthwith notify the state tax commission in writing of such

appeal, and if he fails to so notify the state tax commission within ten days after such an appeal has been taken to the quarterly court he shall be guilty of a misdemeanor and upon conviction may be fined in any sum not to exceed one hundred dollars ($100.00). If the county attorney or sheriff feel that the state, county or any taxing district has been aggrieved by the action of the board of supervisors, or on account of the failure of said board to act, then either of said officers may appeal to the quarterly court by filing with the judge thereof a brief statement showing the action of the board of supervisors or stating wherein it failed to properly act. The quarterly court shall hear evidence and pass upon all such appeals and either of said officers or tax commission may appeal to the circuit court and then to the court of appeals the same as in other civil cases. It shall be the duty of the county attorney to represent the interest of the state and county in all such appeals in the quarterly and circuit court, and it shall be the duty of the attorney general to represent the interest of the state and county in the court of appeals. Where an appeal is taken by the county attorney or sheriff as herein provided, it shall be the duty of the county attorney to notify the state tax commission in like manner as when an aggrieved taxpayer appeals, and if he fails so to do he shall be subject to a like penalty" (*Id.*, Sec. 14, as amd. April 11, 1917, c. 1., p. 3, Sec. 32).

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APR 3 1930

# Supreme Court of the United States

OCTOBER TERM, 1929.

No. [illegible] //

---

JUNIUS C. KLEIN, - - - - - - - Appellant,

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - Appellee.

---

*Appeal from the Court of Appeals of the State of Kentucky.*

---

## BRIEF FOR APPELLANT.

---

JUNIUS C. KLEIN,
JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
*Counsel for Appellant.*

JOHN S. MILLIKEN,
*Of Counsel.*

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

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# Supreme Court of the United States

OCTOBER TERM, 1929.

No. 442.

---

JUNIUS C. KLEIN, - - - - - - *Appellant,*

*v.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - *Appellee.*

---

*Appeal from the Court of Appeals of the State of Kentucky.*

---

## BRIEF FOR APPELLANT.

---

### STATEMENT.

This appeal (writ of error) is from a judgment of the Court of Appeals, the highest court of the State of Kentucky (R. 54), affirming a judgment of the Jefferson Circuit Court (R. 49), dismissing the appellant's appeal from the action of the Board of Tax Supervisors of Jefferson County, Kentucky (R. 1).

*The facts of the case are as follows*:

The County Tax Commissioner made an assessment of appellant's shares of stock in the Standard Sanitary

Manufacturing Company at $95.00 per share of *$25 par value*. As provided in Kentucky Statutes, Sections 4123 and 4128 (*printed in appendix, and as exhibit with printed statement complying with Rule 12 of the Court, hereinbefore filed*) appellant petitioned the Board of Tax Supervisors of Jefferson County to review the assessment (R. 4, *et seq.*, also R. 7, *et seq.*).

Failing to obtain relief appellant, as permitted by Kentucky Statutes, appealed to the Quarterly Court of Jefferson County (R. 11, *et seq.*), which affirmed the action of the Board of Tax Supervisors of Jefferson County; whereupon appellant appealed to the Jefferson Circuit Court (R. 21, *et seq.*).

The Jefferson Circuit Court made separate findings of law and facts (R. 43, *et seq.*), and held (R. 47, 48), that Kentucky Statutes, Section 4088, under which the assessment was made was constitutional, and not in violation of the uniform provisions of the State Constitution, and did not deny to the appellant the equal protection of the law. Accordingly the Court (R. 49) adjudged that the action of the Board of Tax Supervisors was sustained, and the valuation of $95 per share of $25 par, on the common stock of the Standard Sanitary Manufacturing Company approved; and that appellant's appeal be and it was dismissed.

The controlling Kentucky Statute, and the Statute assailed, is Section 4088, Carroll's Kentucky Statutes, 1930 Edition (Acts March 4, 1924, c. 116, p. 402, subsection 3), as follows:

"The individual stockholders of a corporation, at least seventy-five (75%) per cent of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky (including the corporate franchise when the franchise is required to be assessed), provided the shareholder furnishes satisfactory proof to the taxing authorities that at least three-fourths of the total property of such corporation is taxed in Kentucky" (See appendix).

As the practice required, appellant filed grounds and moved the Court for a new trial, and upon the motion being overruled he prayed an appeal to the Court of Appeals, which was granted (R. 50). The Court of Appeals (R. 55) delivered its opinion June 21, 1929, and entered judgment (R. 54) as follows:

"The Court being sufficiently advised it seems to them there is no error in the judgment herein.

"It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

"It is further considered that the appellees recover of the appellants their costs herein expended."

The Court of Appeals, in its opinion aforesaid, decided against appellant his claim that to assess his shares aforesaid for taxation denied to him the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Federal Constitution.

## JURISDICTION OF THE COURT.

This Court's jurisdiction of this appeal has already been confirmed on the printed statement hereinbefore filed in compliance with Rule 12 of this Court.

The jurisdiction of this Court over the appeal is sustained by Judicial Code, Section 237, Paragraph A, U. S. Code, Title 28, Section 344, and by the following cases interpreting the Federal legislation just noted:

*Consolidated Turnpike Co.* v. *Norfolk & Ocean Ry. Co.*, 228 U. S. 326.
*Love v. Griffith*, 266 U. S. 32.
*Northern Pacific Ry. Co.* v. *Department of Public Works, et al.*, 268 U. S. 39.
*Louisville Gas & Elec. Co.* v. *Coleman, Auditor*, 277 U. S. 32.
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*Farmers L. & T. Co., Ex'r.*, v. *Minnesota*, 280 U. S. 204.
*New Jersey Bell Tel. Co.* v. *State Board*, 280 U. S. 338 (January 6, 1930).

## FINDINGS OF LAW AND FACTS.

The judgment of the Court of Appeals was based upon the separate findings of law and facts made by the Judge of the Circuit Court (R. 43, *et seq.*), as follows:

"This case having been submitted on the law and the facts, the pleadings, exhibits, and the stip-

ulations filed herein, and the deposition of Ben Marshall; Now the Court being fully advised, finds the facts in the case are as shown by the said stipulations filed herein by agreement of parties on April 12, 1927:

Stipulations.

"It is hereby agreed by counsel for appellant and by counsel for appellees that the following stipulations of facts shall be considered as conclusive evidence of said facts at the trial of this action subject alone to competency and relevancy.

"That the Standard Sanitary Manufacturing Company is a foreign corporation organized under, and by virtue of the laws of the State of New Jersey, and is duly authorized to do business in this State, and was so doing business in this State of Kentucky on the 1st day of July, 1924.

"That it had issued and outstanding on the 1st day of July, 1924, 805,106 shares of Common Stock, of which number 202,083 shares were held and owned by 1,028 persons, citizens and residents of, and domiciled in this State of Kentucky, on said 1st day of July, 1924, and all of whom have been assessed for 1925 State taxes on their respective holdings at the rate of $95.00 per share.

"That the total number of preferred shares of said company issued and outstanding on said 1st day of July, 1924, was 46,667 shares of which number 16,680 shares are held and owned by persons citizens and residents of the State of Kentucky.

"That said stockholders residing in Kentucky, own and hold in round figures, twenty-five per cent

(25%) of the total issue of said Common Stock and thirty-three per cent (33%) of the total issue of said preferred stock.

"That said Standard Sanitary Manufacturing Company, on the 1st day of July, 1924, held and owned properties and assets consisting of real estate and tangible personalty, located in Jefferson County, State of Kentucky, all of which was acquired and held by it for corporate purposes and all of which has been fully listed by said Company for assessment for 1925, State, County, City of Louisville taxes and for all other purposes, and duly assessed both by the Jefferson County Board of Tax Supervisors for State Taxes for the year 1925, and for all other purposes, at a total value of $2,263,390, which was its fair cash value estimated at the price it would bring at a fair voluntary sale, and which is over twenty-five per cent (25%) the total assessed value of its total properties in twenty-two states of the United States of America, in which states the Standard Sanitary Manufacturing Company has its properties and was doing business as of the 1st day of July, 1924; that the total assessed value of all of the said Standard Sanitary Manufacturing Company's assets and properties in said twenty-two states of the United States was $8,522,822.62, as of the 1st day of July, 1924. That the other 75% of its total properties, 85% of which consists of real estate and tangible personalty, is located and has a taxing situs on the 1st day of July, 1924, outside of, and beyond the limits of this State of Kentucky, all which properties have been duly listed by the said Standard Sanitary Manufacturing Company,

with the taxing authorities of every State in which its properties are located, and assessed by said taxing authorities for taxation, and for all purposes as required by the laws of said respective states or political subdivisions of same, and said Company has paid and is now paying all such taxes on same as they become due. That the foregoing assessed values and taxes do not include any license or franchise tax or income taxes, all of which have also been duly assessed against and paid by said Standard Sanitary Manufacturing Company; that the book value of the said shares of Common Stock of the said Standard Sanitary Manufacturing Company as of the 1st day of July, 1924, was $39.11 per share, and the par value of same was $25.00 per share. That there was no sale of said common stock had or made or reported by newspapers on the 1st day of July, 1924. That said Common Stock is only listed on the Stock Exchanges of the cities of Pittsburg, Pennsylvania, and Louisville, Kentucky.

"That the appellant is a citizen of the State of Kentucky, and resides in Louisville, Jefferson County, Kentucky, and was the owner and holder of 4,591 shares of the said Common Stock of the Standard Sanitary Manufacturing Company, on the 1st day of July, 1924, and duly listed said stock with the Jefferson County Tax Commissioners for taxation as of the 1st day of July, 1924, but claimed the said stock was non-assessable. That the said Jefferson County Tax Commissioner, over the protest and objection of the appellant valued said stock at the rate of $95.00 per share, which valuation was arrived at by him by averaging the sales

of small blocks of stock ranging from ten to twenty shares, as reported 'by the stock reports published in the newspapers of the cities of Louisville and Pittsburgh, as having been made in the week prior to and the week after the 1st day of July, 1924.'

"That appellant duly appeared in person, and by counsel, before the Jefferson County Board of Tax Supervisors on being notified of the action of the Jefferson County Tax Commissioner and filed with said Board his written objections and reasons therefor to the aforesaid assessment of his said common stock at $95.00 per share, for, and on behalf of himself and all other holders and owners of said stock, citizens and residents of the State of Kentucky, and who were likewise assessed with their respective holdings at the same rate of $95.00 per share, on the 12th day of March, 1925, at which time said Board was duly assembled and in session for the purpose of reviewing and correcting the assessments of persons where same were complained of.

"That appellant requested said Board to be allowed to produce proof to sustain his said objections at that time, or at such other time as said Board might fix. That said board declined and refused said request and acted thereon as shown by the judgment or order of Court herein of March 11, 1925, and sustained the assessment of said common stock as made by the Jefferson County Tax Commissioner at $95.00 per share, to all of which the appellant objected and his objection being overruled excepted at the time and still excepts.

"That during several months prior to July 1st, 1924, rumors were promulgated at the stock ex-

change of Louisville and Pittsburgh, and among the financial institutions of said cities, that a 40% stock dividend was expected to be declared and paid by the Standard Sanitary Manufacturing Company in the fall of 1924, in addition to the regular cash quarterly dividends *therefore* paid at $1.25 per share.

"That no stock dividend was declared or paid by said Standard Manufacturing Company on its Common Stock during the year 1924; but that a stock dividend of 25% was declared and paid on February 1st, 1925, and that the average market value of stock in December, 1924, was $117.00.

"That in no case has real estate in this state been assessed for taxation purposes at a speculative value due either to the favorable location of same in relation to the trend of business especially in the City of Louisville, or County of Jefferson, or to the pressing need of purchasers paying exorbitant prices for real estate to round out their holdings.

"That during a period of a month prior to the 1st day of July, 1924, and a month after said date, the number of shares of said Common Stock traded in and transferred on the books of the said Standard Sanitary Manufacturing Company was less than 5% of the total issue outstanding at the time."

"The Court further finds that the only other fact presented in the case is contained in the deposition of Ben Marshall, Secretary of the State Tax Commission of the State of Kentucky, which fact the Court finds to be that the assessment of real estate by the assessing authorities of the State of

Kentucky, in the County of Jefferson, State of Kentucky, for the year 1925 as of July 1, 1924, was had and made on a basis of 69.9 per cent of its fair cash value, estimated at what it would bring at a fair voluntary sale thereof, and that the ratio, or average, of the assessments for taxation of real estate in all of the counties of the State of Kentucky, for said year 1924, was between 65% and 70% of the fair cash values of same.

"The Court further finds as conclusions of law based on the above facts, that the assessments had and made by Jefferson County Tax Commissioner of the shares of stock of the Standard Sanitary Manufacturing Company held and owned by plaintiff, Junius C. Klein, and all other holders residing in Jefferson County, Kentucky, at a valuation of $95.00 per share for purposes of State taxation for the year 1925, was the full, fair cash value of same, as of the first day of July, 1924, estimated at what it would bring at a fair voluntary sale thereof; and that the assessment of said shares of stock as aforesaid *the* at the same time the Standard Sanitary Manufacturing Company was also assessed for purposes of State taxes for said year 1925, with its real estate and other property, situated in the State of Kentucky, was not double taxation;

"The Court further finds that assessment complained of herein of said shares of stock for State purposes, is not null or void and is not contrary to or in violation of the Constitution of the State of Kentucky, or the Constitution of the United States of America.

"The Court further finds that Section 4088 of the Kentucky Statutes under which the above assessment was made, is constitutional and not in violation of the uniform and equal provisions required by the State constitution in the assessment of properties for taxation purposes, and does not deny to the plaintiff the equal protection of the law. To each and every conclusion of law aforesaid, the appellant and all other holders and owners of said common stock who reside in Jefferson County, Kentucky, object and except."

It was sufficient, of course, that the Federal question was raised and decided adversely to us by the Court of last resort, but it was first raised in the Amended and Supplemental Statement of Appeal (R. 12); afterward in the Reformed Amended and Supplemental State of Appeal (R. 21-23), as well as in the separate Findings of Law and Facts (R. 43-48).

## ASSIGNMENTS OF ERROR.

The assignments of error are as follows (R. 63):

"1. The Court of Appeals of Kentucky erred in affirming the judgment of the Jefferson Circuit Court sustaining the demurrer to plaintiff in error's petition, filed in this cause and dismissing plaintiff in error's petition.

"2. The Court erred in overruling plaintiff in error's contention that the statute in question, Section 4088, Kentucky Statutes, as amended by Acts of 1924 was in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States.

"3. The Court erred in holding that no right secured to the plaintiff by the Fourteenth Amendment to the Constitution of the United States was violated by the imposition by the defendants of the assessment complained of.

"4. The Court erred in holding and adjudging that the plaintiff was not by the assessment complained of deprived of its property without due process of law.

"5. The Court erred in holding that Section 4088, Kentucky Statutes (Carroll's 1922 edition) as amended by chapter 116, page 402, section 2, of the Acts of 1924 of the General Assembly of Kentucky, was not in conflict with or in violation of the Fourteenth Amendment to the Constitution of the United States.

"6. The Court erred in holding that said Section 4088, Kentucky Statutes, was not in conflict with Sections 170, 171 and 172 of the Constitution of the State of Kentucky.

"Wherefore the appellant prays that the said judgment be reversed and that the said Court of Appeals of Kentucky be ordered to enter a judgment reversing the judgment of the Jefferson Circuit Court, appealed from by the appellant to the said Court of Appeals of Kentucky, and directing the said Jefferson Circuit Court to enter judgment in appellant's favor, setting aside said judgment heretofore entered dismissing the plaintiff's petition and directing it to overrule the demurrer to said petition, and to hold the assessment complained of to be null and void and of no force and effect."

## ARGUMENT.

The questions to be urged for reversal in this Court are:

(1) That the State courts and taxing boards deny to appellant the equal protection of the laws in assessing their property at 100%, while at the same time real estate was assessed in Jefferson County at 69.9% of its fair cash value, and in all the counties of Kentucky on an average of 65 or 70% of its fair cash value, the said assessment of the property of appellant and the shareholders of said corporation being intentionally, habitually and deliberately assessed at 100% of its value, while the real estate of other taxpayers of the counties of the State of Kentucky were intentionally, habitually and deliberately assessed at only 70% of its fair cash value.

(2) That inasmuch as the State cannot tax a foreign corporation's property outside the State, and can tax only the percentage of its property which may be in the State, it should not be possible to tax shares in the corporation held in the State, or, at most, tax them at a ratio in excess of the percentage by which the State could tax the corporations property.

(3) In sympathy with the principle just mooted, this Court is now restricting the rule under which double or multiple taxation has been allowed; see *Farmers L. & T. Co., Ex'r of Taylor* v. *Minn.*, 280 U. S. 204 (Jany. 6, 1930).

(4) Assuming, however, that the doctrine that the shareholder may be assessed on his shares at 100%,

regardless of what property of the corporation, if any, may be in the State of his domicile, nevertheless it is not within the power of the State to arbitrarily discriminate between corporations as to the taxation of their shareholders or their shares. Both corporation and the shareholders are interested to the contrary—the shareholder because the price of his shares is diminished, and the corporation because it cannot raise money in competition with its competitors in whose favor the discrimination is made. These considerations are regarded by this Court as of great importance because so large a part of the country's wealth is invested in negotiable securities.

**A.**

**Equalization.**

Confessedly appellant's stock was assessed at 100% —*appellant claims at very much more*—while real estate in Jefferson County was assessed at 69.9%, and real estate in all the counties of Kentucky on an average of 65 or 70%, so that appellant was denied the equal protection of the laws to the extent of 30%, or more.

The figures just given are sustained by the testimony of Ben Marshall, secretary of the State Tax Commission (R. 29), and the case is brought within the principle of *Louisville & Interurban R. Co.* v. *Greene,* 244 U. S. 499.

The Kentucky Court (R. 62) says:

> "Appellant cannot complain that land in Jefferson County is equalized at 70%; for land is

equalized in each county by the county board because land values depend on local conditions; but intangible property is equalized by the state board and is uniform throughout the state."

Just how this statement answers our claim that we were not given equalization we cannot see. If land in Jefferson County was equalized by the county board, and upon local conditions, why were we not entitled to equalization when our land was assessed at 100%, and other land in that county assessed at 69.9%? It matters not, therefore, whether the ratio between assessed and real value be taken in Jefferson County alone or taken in the whole State, for in either case we have been denied equalization.

The State Court does not, of course, controvert our claim that the assessment of real estate, both in Jefferson County and in the State of Kentucky, was systematically, habitually and intentionally assessed at 69.9% in Jefferson County, and 65 or 70% in the State, and indeed the testimony of Ben Marshall, of the State Tax Commission, implies such habitual, systematic and intentional assessment of real estate at the depressed values aforesaid.

## B.

### Taxation of Stock in the Ratio of the Property of the Corporation Held in the State of the Shareholder's Domicile to the Entire Property of the Corporation Held There and Elsewhere.

The State of the shareholder's domicile taxes his shares on the assumption that every share represents an aliquot part of all the property of the corporation wherever situate. The assumption that the shares are themselves property, and property located within the State is the veriest and most mischievous fiction. This Court has lately said, in *Safe Deposit, &c., Co.* v. *Virginia,* 280 U. S. 83 (Nov. 25, 1929):

> "And the fiction of *mobilia sequuntur personam* was intended for convenience, and not to be controlling where justice does not demand it."

Also (p. 94):

> "It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation should compel us to accept the irrational view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment."

Upon the assumption of the State's right to tax shares of its citizens, regardless of the paternity of the corporation, or the location of its property, the State has no just right to tax the shares at a rate in excess

of the ratio of property of the corporation within the State to all its property in all the States, if at all.

*Bethlehem Motors Company* v. *Flynt*, 256 U. S. 421, reversing 178 N. C. 399, 100 S. E. Rep. 693, is in its features most suggestive of the principle involved in the *instant* case.

The State Court in that case upheld the State Statute requiring payment of a license tax to sell automobiles in North Carolina and provided that 4/5ths of such taxes need not be paid if the Company had 3/4ths of its assets invested in the State and returned for taxation therein. The State Court, Clarke, C. J., held the statute unobjectionable, and the judgment of the State Court was reversed by this Court upon the ground that the statute caused discrimination between corporations. This Court's opinion is elaborate and important in solving the *instant* question.

The Bethlehem Motors case treated, of course, of license taxes on corporations, but the principle is equally applicable to the taxation of the capital stock of corporations, for neither directly taxes the property of the corporation. The license tax is a charge against the corporation and diminishes the value of the shares, and the *ad valorem* tax upon the shares of the shareholder diminishes the value of the shares; and, as we have just seen, unjust taxation of the corporation itself deprives the stockholder of his property, and unjust taxation of the stockholder injures the corporation correspondingly. For practical purposes, therefore—and this Court has lately remarked the practical effect of

taxation—the principle which condemns one of the taxes just mentioned is essentially applicable to the other taxes.

The Bethlehem Motors case was applied in *Ward Baking Co.* v. *Fernandino* (Fla.), U. S. D. C., 29 Fed. (2d) 789, where the Court said, among other things, that

> "the classification upon which the difference in tax is based is not according to occupation, but according to residence."

In *Campbell Baking Co.* v. *City* (D. C., Mo.), 19 Fed. (2d) 159, the case was similar to the Ward Baking Company case, and the Court held unconstitutional the ordinance in question upon the authority of *Pierce* v. *Society,* 268 U. S. 510.

We are unable to find other Federal citations of the Bethlehem Motors case.

The doctrine that a State has no authority, or jurisdiction, to tax the property of a foreign corporation situated outside the State is now too familiar to need citation of authorities to support it, but it has been applied so often by this Court that different developments of the principle are interesting; see:

*Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1.
*Pullman Co.* v. *Kansas,* 216 U. S. 56.
*Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146.
*Western Union Tel. Co.* v. *Andrews,* 216 U. S. 165.
*Southern Ry. Co.* v. *Greene,* 216 U. S. 400.
*International Paper Co.* v. *Mass.,* 246 U. S. 135.
*Air-Way Electric Co.* v. *Day,* 266 U. S. 71.
*Hanover Fire Ins. Co.* v. *Carr,* 272 U. S. 494, 508.
*Alpha, &c., Co.* v. *Mass.,* 268 U. S. 203, 216.

*Frick* v. *Pennsylvania,* 268 U. S. 122.
*Bethlehem Motors Co.* v. *Flynt,* 256 U. S. 421.
*Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69.

*International Paper Co.* v. *Massachusetts,* 246 U. S. 135, expounds what is most cogent in our favor. It reaffirms the principle of the case of *Western Union Tel. Co.* v. *Kansas,* and other similar cases.

Massachusetts had laid a tax requiring every foreign corporation doing business in the State to pay an excise tax of 1/50th of 1% of the par value of its authorized capital stock, not exceeding a tax of $2,000 in any year, and also an excise tax of 1/100th of 1% of the par value of its authorized capital in excess of $10,000,000. The Company was a New York corporation with an authorized capital of $45,000,000, and its total assets were $39,000,000 or $40,000,000, of which not more than 1¾% were invested in Massachusetts. Its business was manufacturing and selling paper, and it operated twenty-three mills, of which only one was in Massachusetts. The output of its mills was sold both interstate and intrastate, principally the former. About 86% of the sales negotiated through the Massachusetts agency were interstate and 14% local. No goods were kept on hand from which current sales were made. The executive and financial offices were in New York. The corporation paid *ad valorem* taxes in Massachusetts. The *ad valorem* assessment was $472,000, and the tax paid thereon $8,118. The tax in controversy was in addition to the property tax, and amounted to $5,500. The State Court upheld the tax as a privilege tax.

This Court said, holding the tax invalid, that the general principles involved were so well established as to be no longer open to controversy. *Western Union Tel. Co.* v. *Kansas,* and other cases were reviewed, and the result stated as follows (p. 141):

> "1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation,—meaning a corporation of a sister State,—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on State action.
>
> "2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.
>
> "3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.
>
> "4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.
>
> "5. A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business

in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

"6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce *and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State.*"

This Court added:

"True, those were cases where the business, interstate and local, in which the foreign corporation was engaged was that of a common carrier. But the immunity of interstate commerce from State taxation is not confined to what is done by the carriers in such commerce. On the contrary, it is universal and covers every class of interstate commerce, including that conducted by merchants and trading companies. And as respects the power of a State to tax property beyond its jurisdiction belonging to a foreign corporation, it is of no moment whether the corporation be a carrier or a trading company, for a State is wholly without power to impose such a tax."

After elaborate review of *Looney* v. *Crane,* 245 U. S. 178, and declaring that it was immaterial whether the violation of the Commerce Clause was great or small; and after expounding *Baltic Mining Co.* v. *Mass.,* 231 U. S. 68, this Court concluded (p. 145):

> "What has been said sufficiently shows that the tax in question should have been declared unconstitutional and void as placing a prohibited burden on interstate commerce and laid on property of a foreign corporation located and used beyond the jurisdiction of the State."

This decision, and the reasons given for it by this Court, are most important in the consideration of our case because although the Standard Sanitary Mfg. Co. was not a common carrier, it was a corporation with its headquarters in New Jersey, having property and transacting business in 22 States, and engaged in interstate commerce. It matters not, therefore, that the corporation was not a common carrier, such as the Louisville & Nashville Railroad Co., or the Illinois Central Railroad Company, operating railroads in and through the State of Kentucky, having less than 75% of its property in said State.

In *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, this Court held that a State could not impose an excise tax on a foreign corporation doing an interstate business within its borders measured by the proportion of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions, since the tax would constitute an

unconstitutional burden on interstate commerce; *also that the State might not tax property beyond its borders under the guise of regulating or taxing intrastate business.*

The statute involved provided that every foreign corporation should pay annually for doing business in the State an excise of $5.00 per thousand on the value of the corporate excess employed within the State, and 2½% of that part of its net income derived from business transacted within the State; provided that the total tax should not be less than 1/20th of 1% of such proportion of fair cash value of capital stock as assets employed in the State bore to total assets.

The State's contention was that payment of the tax was not made a condition precedent to doing business; that the collection of the tax was to be made by ordinary methods; that there was no discrimination either against foreign corporations or interstate commerce, and that the taxes complained of were excise and not property taxes. It contended that being excises the taxes were not on property or net income, but were taxes measured by property and net income, used in or derived from business done in Massachusetts.

After reviewing *Cheney Bros.* v. *Mass.*, 246 U. S. 147; *International Paper Co.* v. *Mass, supra,* and other cases, this Court said (p. 218):

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property *beyond her borders under the guise of regulating or taxing intrastate business.* So to burden

interstate commerce is prohibited by the Commerce Clause; and *the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction.* The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved." (Italics ours.)

In *Cudahay Packing Co.* v. *Hinkle,* 278 U. S. 460, this Court held that to exact license fees from a foreign corporation doing interstate business, based on authorized capital stock, where only a small part of its property was located within the taxing State and a relatively small proportion of its business there transacted, offended the Commerce Clause, notwithstanding the maximum fee exactable was limited; also held that where the fee was based upon authorized capital, and only a small part of the corporation's property was in the taxing State, and a relatively small part of its business there transacted, the fee constituted an interference with due process in attempting to tax property beyond the jurisdiction of the State, notwithstanding the fee was limited.

The tax was condemned on authority of *Looney* v. *Crane,* 245 U. S. 178, 187; *Alpha, &c.,* v. *Mass., supra,* and *Air-Way Electric, &c., Corp.* v. *Day,* 266 U. S. 71. Brandeis and Holmes, J. J., dissented.

The Legislature of Kentucky recognized the principle of *Western Union Tel. Co.* v. *Kansas, supra,* and

the subsequent cases involving the same principle, when providing for license taxes on corporations, and enacting Kentucky Statutes, Section 4189-1 and 4189-2 (Carroll's 1930 Edition); Acts 1926, c. 74, Sections 1 and 2, p. 203, as follows:

> "*Section 4189-1. License tax on corporations.*—Every corporation organized by or under the laws of this or any other state or government, owning property or doing business in this state, except foreign insurance companies, whether fire, life, accident, casualty or indemnity, foreign and domestic building and loan associations, banks and trust companies, and corporations which, under existing laws, are liable to pay a franchise tax, shall pay to this State, to be credited to the general expenditure fund, an annual license tax based upon the asset value of its capital stock, as hereinafter provided.
>
> "*Section 4189-2. Amount of tax.*—Every corporation shall pay an annual license tax of seventy cents on each one thousand dollars of that part of the asset value of its capital stock *represented by property owned and business transacted in this state,* which shall be ascertained by finding the proportion that the property owned and business transacted in this state bears to the aggregate amount of property owned and business transacted in and out of this state.
>
> "Provided, that such corporation may pay at said rate upon the entire asset value of its capital stock; and in that event it shall not be required to report as in subsection b of Section 4189-3 hereof. And its failure so to report shall be deemed con-

> clusive evidence that such corporation elects to pay upon the entire asset value of its capital stock, and it shall be its duty so to do, and the duty of the state tax commission so to fix its license tax accordingly. (Italics ours.)

Obviously, the principle expounded by this Court in *Western Union Tel. Co.* v. *Kansas,* and subsequent cases declaring the same principle, is persuasive of the point now made in the *instant* case, because taxation in the cases cited was imposed upon the amount of the capital stock of the corporations, and the Kentucky Statute now assailed by appellant imposes primarily taxes on the corporation's stock, but in the *instant* case the taxation is not imposed in proportion to the property of the corporation in the State but ownership by the corporation of 75% of its property taxable in Kentucky is selected as the criterion of taxation of the corporation's shares, and is selected as arbitrarily as 25% was selected in the earlier statute. So, in any aspect of the case now presented to this Court, the taxation of the stock of the Standard Sanitary Mfg. Co. is in its essence as objectionable as the license taxation based upon the entire authorized stock of the corporation in *Western Union Tel. Co.* v. *Kansas* and similar cases, albeit the taxes in those cases were laid directly upon the corporation itself.

C.

**Unsoundness of Double or Multiple Taxation.**

Upon principle it would seem inconceivable how it could ever have been supposed that taxation of the corporation's property and taxation also of the shares of its shareholders was not double taxation. It is comprehensible how a State, always desiring more revenue, and exercising the utmost ingenuity in expanding its search for something more to tax, should contend that the shareholder domiciled within its territory should be taxed because his shares were within reach, but while shares are available, they are so because they represent property, and when the property is in another State, taxation of the shares is taxation of property outside the jurisdiction of the taxing State. *There is no escape from this conclusion.* But such taxation has always been an abuse, and has led courts and legislatures into inextricable inconsistencies. These have of late been recognized as injustices and enormities.

It is especially in the imposition of multiple inheritance taxes that the absurdity has been most plainly exposed, but multiple taxation therein has been upheld upon the ground that inheritance taxes were excise taxes and not property taxes, and, consequently, not protected by the Fourteenth Amendment. This doctrine was announced in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Blackstone* v. *Miller,* 188 U. S. 189, and in *Wheeler* v. *Sohmer,* 233 U. S. 434; but this Court called a halt on the extension of the doctrine

in *Frick* v. *Pennsylvania*, 268 U. S. 473, and has now definitely condemned multiple taxation in inheritance tax cases in *Farmers L. & T. Co., Ex'r of Taylor*, v. *Minn.*, 280 U. S. 204, overruling *Blackstone* v. *Miller*, *supra*.

The principle at the base of the decision in *Farmers L. & T. Co., Ex'r of Taylor* v. *Minn.*, applies to the taxation of shares at the shareholder's domicile at 100% when the property represented by the shares lies wholly or partly in other States. In as much as inheritances cannot be taxed except in the State of the decedents' domicile when they consist of intangibles, or at the *locus in quo* when they consist of tangibles, because taxation belongs to the jurisdiction over the property in question—upon the same principle the shares of the shareholder in a corporation cannot *rightly* be taxed at all because to tax them amounts to taxation of property in another jurisdiction, *or, at most,* cannot properly be taxed in excess of the ratio of *net* property in the State of the domicile to property situate there and elsewhere.

It certainly appears strange that when, as this Court has lately said, taxation is something so practical, different States should have been permitted to multiply taxation and heap up subsidies without any real or substantial basis upon unsubstantial fictions, which were nothing but fictions. But this Court has now, in the Taylor case, *supra,* stripped the mask from the fiction and exposed it to destruction.

## D.

**Assuming the Propriety of Taxing Shares and Also Taxing the Property of the Corporation, the State of the Shareholder's Domicile has no Right to Arbitrarily Discriminate Between Corporations and Arbitrarily Select Those Whose Stockholders are to be Taxed and Omit to Tax the Stockholders of the Others.**

If we assume, for argument's sake, that the shareholder may still be assessed at 100% regardless of what property, if any, of the corporation may be located within the State of domicile, it is not within the power of the State to arbitrarily discriminate between corporations in the taxation of their shareholders. Both corporation and the shareholder are interested to the contrary—the shareholder because the price of his stock is diminished, and the corporation because it cannot raise money in competition with its competitors in favor of whom the discrimination is made, if the competitor's shareholders are not taxed and its shareholders are taxed. The stock of the one will be diminished in the market by the amount of the tax, while the stock of the other remains undiminished.

Assuming, for illustration, that the stock of corporation "X" pays a 6% dividend and is taxed 50c on $100, and that corporation "Y" pays the same dividend but its stock is not taxed—the conditions of the two being otherwise equal—the yield of the stock of corporation "X" becomes 5½%, while that of corporation "Y" remains 6%. It is obvious that there would be no

market for the stock of corporation "X" when the money-lender could buy the stock of corporation "Y." It is, therefore, manifest not only that the Legislature has greatly discriminated between two corporations, to the great disadvantage of one, but has so discriminated upon a basis which is purely arbitrary.

By an Act of 1917 the shareholder was not taxed if 25% of the corporation's property was in Kentucky, and now by the Act of 1924, the shareholder is taxed unless at least 75% of the corporation's property be in Kentucky. The criterion adopted in either case is purely arbitrary. The only conceivable reason for substituting 75% of property for 25% thereof is that the shareholders of more corporations are reached by the later Statute, whereby the tax-eater gets more money. The legislation is purely arbitrary, and the so-called classification is not predicated upon any basis having reasonable relation to the classification made. That the legislation therefore offends the Fourteenth Amendment is demonstrable upon the authority of late decisions of this Court, aside from the consideration of earlier decisions.

The litigation in the State Court, culminating in the judgment appealed from, originated in *Middendorf* v. *Goodale* (Nov. 13, 1923), 202 Ky. 118, 259 S. W. 59, where the decision of the State Court upheld the Kentucky Statute later condemned by this Court in *Louisville Gas & Electric Company* v. *Coleman, Auditor,* 277 U. S. 32; reversing 213 Ky. 762, 281 S. W. 1017.

In *Louisville Gas & Electric Company* v. *Shanks, Auditor* (Coleman case), (March, 1926), 213 Ky. 762, 281 S. W. 1017—reversed 277 U. S. 32—the Statute considered in the Middendorf case was upheld, the Court basing its ruling upon the decision in that case, and declining to review its discussion made in the Middendorf case. The position taken by the State Court in the Shanks (Coleman) case was, therefore, repudiated by this Court.

In *Siler* v. *Board of Supervisors* (May 31, 1927), 221 Ky. 100, 298 S. W. 189, the Court, in an elaborate opinion, upheld the Statute which we now assail in the *instant* case, and cited as its authority the Middendorf case and its decision in the Shanks, or Coleman case, saying (p. 105):

> "The General Assembly enacted section 4019a-9, Ky. Stats., imposing what is known as the mortgage recording tax. This tax is imposed on mortgage indebtedness running five years or longer, but the tax is not imposed if the mortgage indebtedness runs less than five years. *This court upheld that statute,* and said there was no discrimination, as the General Assembly had the power to impose the mortgage recording tax on indebtedness running for five years or longer, and to exempt from the tax all indebtedness running for less than five years" (Citing the cases aforesaid in 202 Ky. 118, and 213 Ky. 762). (Italics ours.)

The Kentucky Court of Appeals, therefore, based the judgment from which we appeal upon the doctrine

of that court expounded in cases based upon the Registry Statute, afterward repudiated by this Court in *Louisville Gas & Electric Co.* v. *Coleman.*

It, therefore, logically follows that the judgment in the *instant* case should be reversed on the principle involved in the decision in the Coleman case (277 U. S. 32).

Our right to a reversal, however, is even stronger than the right of the plaintiff-in-error in the Coleman case was, because it was assumed, both by the majority and by the minority of the justices of this Court in that case, that the mortgage tax was a privilege tax, and not a property tax. The same position was taken elaborately by the State Court in the Middendorf case. Indeed, in that case the Court seems to have assumed that if the mortgage tax had been a property tax the decision would have been the reverse, for the Court recited (202 Ky. 126):

> "Our consideration of Section 4019a, Kentucky Statutes, has brought us to the conclusion that the tax imposed by it as a privilege tax; that is, a tax imposed upon the privilege of recording mortgages and instruments creating like liens, the payment of which is entirely optional with the owners or holders thereof."

Again (p. 127):

> "Another distinguishing feature of the mortgage recording tax is, that it is required to be paid but once; that is, when the mortgage is lodged for record; and this is so whether the ownership of

the mortgage be retained by the mortgagee or other beneficiary named therein, or shall pass by assignment to another.

"While what we have thus far said of the tax in question would seem *sufficient to show wherein it differs from the property tax,* a brief statement of the nature and characteristics of the latter tax will give emphasis to the differentiation" (Italics ours).

Again (p. 128):

"While this court has not heretofore been directly called upon to decide whether the tax in question is *a privilege* or *a property tax,* courts of last resort of several other States have declared such tax a privilege tax and sustained the constitutionality of statutes imposing it, the provisions of which are substantially the same as those contained in the statute of this State under consideration" (Citing authorities). (Italics ours.)

This Court, in *Louisville Gas & Electric Co.* v. *Coleman* (277 U. S. 32), said (p. 36):

"The state court of appeals, in disposing of the contention that the statute violated the state constitution, held that the tax imposed *was not a property tax but a privilege tax,* that is, a tax imposed upon the privilege of recording mortgages, etc., the payment of which, it was said, was entirely optional with the owners or holders thereof. This determination of the state court, in so far as it affects the challenge under the state constitution, we accept as conclusive, in accordance with

> the well-settled rule. *Merchants Bank* v. *Pennsylvania,* 167 U. S. 461, 462. But the State Court further held that the statute was not in conflict with the equal protection clause of the Fourteenth Amendment, and this presents a different question calling for our independent consideration and decision."

Our claim, therefore, to reversal is not necessarily impugned by the views of either the majority or the minority opinions in the Coleman case (277 U. S. 32, 41 *et seq.*), because a privilege tax may be upheld where an *ad valorem* property tax would not be, and a tax imposed on our stock is a property tax.

That the Statute under which the complaining stockholders in the *instant* case were taxed discriminates against them is illustrated by the history of legislation on the subject in Kentucky.

By Section 4085, Ky. Stats., *1915 Edition,* it was provided concerning stockholders of corporations (See Appendix).

> "and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation."

By the amendment of May 2, 1917, c. 11, Sec. 2, p. 45, it was enacted as Section 4088 (see Appendix):

> "The individual stockholders of a corporation, *at least one-fourth* of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation

pays taxes on all its property in Kentucky." (Italics ours.)

By the amendment of March 4, 1924, to Section 4088, ch. 116, Secs. 2 and 3, p. 402, the term "75 per cent" is substituted for the "25 per cent" in the statute of May 2, 1917. (*See statutes in full in the appendix.*)

So, from the legislation aforesaid, it is obvious that the present statute, which we now assail, is purely arbitrary, discriminating between corporations without any reasonable basis for classification having relation to the subject of the legislation.

The first statute exempted the shares if the corporation paid taxes on all its property in Kentucky—how much or how little the corporation might have in this State—provided the property was held for corporate purposes; the next statute taxed the shares where the corporation did not pay taxes in Kentucky *on at least one-fourth* of its total property, and the present statute taxes the shares except where the corporation pays taxes in Kentucky *on 75 per cent* or more of its total property. Obviously, the Legislature took no note of any *ratio* between the corporation's property in Kentucky and its property elsewhere.

The present statute, substituting *75 per cent* for *25 per cent* manifests the logical result of permitting the Legislature to ignore the Federal Constitution and act perfectly arbitrarily.

If the Legislature may act arbitrarily, it can provide for more taxes when the State, county and munici-

pal officers desire more taxes, *and may tax such classes of stockholders as it choose, and exempt others,* regardless of any reasonably applicable basis for classification.

Old world potentates issued their ukases for contributions or taxes when their extravagances required more money, until revolution came; we have not yet reached this point, but we are on the way, and in this country taxes have increased at an alarming rate, and if Legislatures may discriminate arbitrarily, taxing such as they desire and exempting others, there is no limit to arbitrary power in taxation and no safety for the taxpayer.

Obviously, while a proper classification for taxation might be reasonably based upon the ratio of *net* assets in the State to total *net* assets, no proper classification can be based upon *gross* assets because gross assets mean nothing in such a problem. For illustration, if a corporation had a million dollars' worth of assets unencumbered and taxed in Kentucky, and had no other property, the shares of the shareholders would be non-taxable under the present statute (Kentucky Statutes, Section 4088, as amended 1924), but if this corporation afterward purchased a million dollars' worth of real estate in Indiana on credit, executing to the vendor mortgage for the purchase money, the shareholders of the corporation would then become taxable, because the corporation would have only 50% of its property in Kentucky, although their shares

would be no more valuable than before, the corporation's *net* assets still remaining one million dollars.

From the foregoing review of the Kentucky Court's decisions on the Registry Statute, Sec. 4019a (the *Middendorf case*, 202 Ky. 118; the *Shanks or Coleman case*, 213 Ky. 762, 281 S. W. 1017) and the Siler case, 221 Ky. 100, 298 S. W. 189, involving Kentucky Statutes, Sec. 4088, under discussion in the *instant* case, it is manifest that the Kentucky Court found itself in an embarrassing predicament when it came to decide the *instant* case (Rec. 55—230 Ky. 182, 18 S. W. (2d) 1009), for in the *Siler case*, direct predecessor of the *instant* case, *and based upon the same statute*, the Court invoked as authority for upholding the statute its own previous decision upholding the Registry Statute, which this Court later held unconstitutional in 277 U. S. 32.

In the *Klein case*, however (230 Ky. 182, 186, 187), the State Court gives this explanation of this Court's decision in the *Coleman case* (277 U. S. 32):

> "In that case the Supreme Court reversed this Court, and held that the statute taxing mortgages running over five years and not taxing mortgages running five years or less was invalid, on the ground that the classification was arbitrary. It is insisted that the same rule should be applied here. *But the Court is unable to see that it has any application.* That case seems to rest upon the idea that long-time mortgages are made by corporations and short-time mortgages are made by the poor, whose credit is not good, and that the stat-

ute taxed the corporations and exempted from taxation individuals." (Italics ours.)

This Court certainly said nothing in the *Coleman case* to indicate that its decision rested upon the ground that the long-time mortgages were made by corporations and short-time mortgages by the poor, and that the statute was void for taxing corporations and exempting individuals; nor indeed did this Court hold that the statute taxed corporations and exempted individuals.

Why, then, the State Court said that this Court in the Coleman case had taken a distinction between taxing corporations and taxing individuals ("the poor"), and how the Court concluded that this Court's decision in the Coleman case had no application to the *instant* case, when that Court had cited in the Siler case (a case like the instant case and based on the same statute) its own decision on the mortgage registry statute, seems incomprehensible.

Inasmuch, however, as the State Court was bound to extricate itself from the predicament in which it found itself, of relying in the *Siler case* upon its previous decision in the *Coleman case,* and, now, of explaining why the *Coleman case had no application to the instant case* (which is like the Siler case), none of us can boast of having any greater ingenuity than the State Court exhibited in the explanation just instanced, *albeit that such explanation was futile.*

The State Court in the *instant* case had come to realize from the Coleman decision that classification by

the Legislature for taxation must be based upon conditions having reasonable relation to the classification made, wherefore the Court essayed to show a reasonable basis for the classification made by the Legislature in the *instant* case. Of course, no reasonable basis could be shown because none existed.

The Court, moreover, ventured this (p. 187):

> "There is a substantial reason for putting stockholders in corporations not paying taxes in Kentucky on so much of their property, on a different footing from those so paying taxes in Kentucky. When the corporation's property is all in Kentucky, and its property is all assessed and the taxes are paid thereon, the property so taxed has in fact borne its fair share of the public burden. Not to assess the stockholder on his stock then is simply to treat a corporation as a firm is treated."

This reasoning needs, we submit, little analysis, for when the Court speaks of some corporations not paying taxes and others paying taxes it says nothing to the point, because it gives no criterion for differentiation between the different corporations. *The door for arbitrary selection is left wide open.*

Nor does the Court progress an iota when it says "not to assess the stockholder on his stock," is simply to treat the corporation as a *firm* is treated, when all the corporation's property is in Kentucky, because if the stockholders of the corporation are to be treated as a firm in one case, no reason exists why they should not be treated as a firm for taxation purposes in all cases,

and if part of the corporation's property lies outside the State, then taxing the stockholders as a firm amounts to taxing property outside the State, and the State is taxing without jurisdiction to tax. Furthermore, for reasons hereinbefore given, there is no reasonable basis for taxing the shareholders where the corporation has 74% of its property in Kentucky, and omitting to tax them when it has 76% in this State.

The State Court, moreover, we submit, went far afield when explaining (p. 187):

> "The Legislature perceived that to do justice a line must be drawn; for, if 1 per cent of the property of the corporation was not assessed, injustice would be done to assess the stockholders, so to do substantial justice the Legislature fixed 75 per cent as the basis. But a large part of the property in any state is never assessed at its fair value. This is known of all men, and so the Legislature, when it came to consider whether stockholders in corporations should be taxed, where the corporation had paid taxes on all its property, did not require that the taxes should be paid by the corporation upon 100 per cent of its property, but fixed a basis of 75 per cent. The reason was to allow a margin. It was an effort to put everybody upon equality, and not to require the stockholders to pay when the corporation had paid on an assessment of its property as large as that of much of the property in the state. The act of the Legislature is simply an effort to approximate justice by a classification resting on reasonable grounds, which are familiar to any one who knows anything

> of the assessment of property in the state. The classification which the Legislature made was not in the interest of the poor man or against the corporation."

The record manifests nothing upon which to base the verbiage just quoted, nor anything in the discussion employed by the Court to show that the criterion adopted for taxing some and omitting to tax other stockholders was other than purely arbitrary. Indeed, the utter insufficiency of the language employed by the State Court to justify the decision of that Court in the *instant* case silently demonstrates the lack of any just basis for the decision. Reversal, therefore, of that decision would seem inevitable.

If any principle be deducible from the language just quoted, it would be that the stockholders of some corporations may be taxable and those of others not taxable, and that a line must be drawn somewhere, and therefore arbitrarily—and thus the State Court clashes with this Court's previous decision in the Coleman case, 277 U. S. 32.

We have only, however, to resort to the later decisions of this Court to demonstrate that the criterion adopted by the statute under discussion is purely arbitrary.

This Court has said, and has reiterated, that classification for taxation must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

In *Stebbins* v. *Riley,* 268 U. S. 137, this Court (Stone, J.) announced the doctrine in regard to inheritance taxation.

In *Air-Way Electric Co.* v. *Day,* 266 U. S. 71, an Act imposing a tax on the entire authorized stock of a foreign corporation doing interstate business within the State, where the stock issued was much less than the authorized stock, was held in violation of the Commerce Clause. This Court in that case said that a tax on the privilege of transacting business in the State *should bear some relation to the value of the privilege.*

The Court held, furthermore, that stock authorized, but not issued, was not a reasonable measure of a tax to be imposed for the privilege of doing business in the State, saying (p. 85):

> "It is clear that the mere number of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415. The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application." (Citing divers authorities.)

The decision in the Air-Way Electric case illustrates and demonstrates the accuracy of our point hereinbefore made, that gross assets can not constitute a

just criterion for classification because gross assets are no more a reliable basis of value than is "authorized" stock. Gross assets are not, as this Court said of "authorized" shares, "*anything having relation to the purpose for which it* (classification) *is made.*"

In *Liggett* v. *Baldridge,* 278 U. S. 105, 113, the Statute required all owners of stock in a pharmacy corporation to be registered pharmacists, although the public health had been already sufficiently safe-guarded by other statutes. This Court condemned the Statute upon the ground that mere stock ownership in a corporation owning and operating a drug store could have no real or substantial relation to the public health, and that the Statute created an unreasonable and unnecessary restriction upon private business. The Court said (pp. 113, 114):

> "We take judicial note of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists."

It is evident that in the cases which we are citing the legislation was purely arbitrary, was without reasonable application to what was legislated for or against, as is true of the legislation in the *instant* case.

In *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, this Court condemned a Statute of Massachusetts, the effect of which was to tax the income from non-taxable securities owned by a corporation. The enactment provided that the corporate income taxable should include "all interest and dividends except dividends on shares of stock of corporations organized under the laws of the Commonwealth and dividends in liquidation paid from capital," and this Court held that the Statute operated to tax Federal bonds and securities, but was unconstitutional.

In reaching its conclusion this Court announced salutary doctrines, *e. g.*, that the effect of the tax should be considered in determining the question of its validity. On this point this Court cited *Brown* v. *Maryland* (12 Wheat. 419, 444), and divers other cases. It discussed *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, pronouncing it an extreme example of measuring income from the property of a corporation by including non-taxable property.

The Court expounded the aphorism employed in *McCulloch* v. *Maryland* (4 Wheat. 316, 431) that "the power to tax involves the power to destroy," and said:

> "The principle, of course, is important only where the tax is sought to be imposed upon a non-taxable subject."

This Court said (p. 629), that courts should be acute in scrutinizing taxing acts like that there involved "to distinguish between an exaction which in

substance and reality is what it pretends to be, and a scheme to lay a tax upon a non-taxable subject by a deceptive use of words."

In *Bekins, &c., Co.* v. *Riley,* 280 U. S. 80, 82, the Court approved a legislative distinction between common carriers operating between *fixed termini* over public roads and other common carriers and private carriers on the ground that the classification was proper. The Court said:

> "The power of the State in respect of classification has often been declared by opinions here. We are unable to say that there was no reasonable basis for the one under consideration; the court below reached the proper result, and its decree must be affirmed. * * *
>
> "That a marked distinction exists between common and private carriers by auto vehicles appears from Frost v. Railroad Commission, 271 U. S. 582, * * * and Michigan Public Utilities Corp. v. Duke, 266 U. S. 570 * * *. Their use of the highways probably will be regular and frequent, and therefore unusually destructive thereto; also it will expose the public to dangers exceeding those consequent upon the occasional movement of other carriers." (Quaker City Cab Co. case, 277 U. S. 389 distinguished.)

Our discussion of the decisions of this Court bearing upon the question of proper classification of persons and objects for taxation has been made so elaborate in order to manifest that cases in point were not overlooked, and to assist the Court as far as we could;

but we submit that the decisions of this Court in *Louisville Gas & Electric Co.* v. *Coleman, Auditor,* 277 U. S. 32, and *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, are decisive of the *instant* case.

*Louisville Gas & Electric Company* v. *Coleman, Auditor,* 230 Ky. 182 (reversed 277 U. S. 32), was based upon the mortgage registry statute, as aforesaid, and the Kentucky Court's decision was cited as authority by that Court in the Siler case, and the Siler case was based on the same statute involved in the *instant* case, so that the Commonwealth cannot with propriety claim that the *instant* case is not controlled by the principle of the Coleman case.

It requires no concession by the Commonwealth, however, to establish the identity of principle in the cases.

The Statute involved in the Coleman case imposed a recording tax upon mortgages lodged for record where the indebtedness did not mature within five years, and exempted from the tax those maturing within five years. The State Court upheld the Statute and this Court condemned it, rejecting the criterion of distinction as arbitrary, and as having no reasonable relation to the subject of the legislation. This Court said of the Fourteenth Amendment (p. 37):

> "It does not, however, forbid classification; and the power of the State to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of

difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Airway Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* .v *Wisconsin,* 270 U. S. 230, 240. That is to say, mere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' (Gulf &c. Co. v. Ellis, 165 U. S. 150, 155.) * * *

"* * * The application of the equal protection clause does not depend upon what name is given to the tax. Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same; where both are incurred by corporations or both by natural persons; where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, the only difference well may be that one is payable in 60 months and the other in 59 months."

This Court said further, concerning the classification (p. 39):

"Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. * * *

"* * * It is said that it is a tax upon a privilege which the owner or holder of the instrument creating a lien is free to accept or reject. But for

practical purposes there is no such option, for, as this Court recently held, there is a practical necessity to record such instruments because, if not recorded, the statute overrides them in favor of purchasers without notice and creditors; and the choice is like one made under duress."

*Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, equally conclusive of the *instant* case in our favor, is even more impressive because of the facts and of the discussion by the Justices.

The State Court's judgment assailed by the Cab Company taxed its gross receipts amounting to $6,049.94. The receipts were derived from the use of motors for transportation *intrastate*. The Cab Company was a New Jersey corporation doing business in Philadelphia. It had the competition of individuals and partnerships upon whose gross receipts no taxes were imposed, although corporations were not exempt from any taxes imposed on individuals or partnerships in the same business. Such corporations as the Cab Company, foreign and domestic, paid capital stock taxes on actual value of property, and a bonus of 1-3 of 1% on par value of all stock issued if a domestic corporation, and a like rate on capital employed in the State if a foreign corporation. The Cab Company's claim for relief was that the Act providing for the taxation in question violated the equal protection clause of the Fourteenth Amendment, and this Court sustained that claim. The discrimination complained of was, therefore, that corporations were taxed while in-

dividuals and partnerships engaged in the same business were not taxed.

This Court, Butler, J., said (p. 400):

"The equal protection clause extends to foreign corporations within the jurisdiction of the State and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances (262 U. S. 544, 550). The equal protection clause does not detract from the right of the State, justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' (274 U. S. 490, 493). It is established that a corporation, by seeking and obtaining permission to do business in a State does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. The right to withhold from a foreign corporation permission to do local business therein does not enable the State to require such a corporation to surrender the protection of the Federal Constitution (Citing divers authorities).

"* * * The words of the section are too plain to require explanation. They could not reasonably be given any other meaning. But, in any

event, a characterization of the tax by the state court is not binding here (*Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346, 348). There is no controversy as to the application of the tax. Plaintiff in error assumes that the section covers its gross receipts, as held by the state court, but insists that the section is invalid because it does not extend to like receipts of natural persons and partnerships. * * * Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises. It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax on gross receipts; it is specifically that and nothing else.

"In effect Section 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. *The character of the owner is the sole fact on which the distinction and discrimination are made to depend.* The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the

subject of the legislation. *Power Co.* v. *Saunders, supra. No decision of this Court gives support to such a classification.* In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violated the equal protection clause of the Fourteenth Amendment." See *The Railroad Tax Cases,* 13 Fed. 722; *County of Santa Clara* v. *Southern Pacific R. R. Co.,* 18 Fed. 385; *Northern Pacific R. Co.* v. *Walker,* 47 Fed. 681. The tax cannot be sustained." (Italics ours.)

The exact application of the principle announced by this Court in the language just quoted to the *instant* case is immediately obvious. The Pennsylvania legislation was condemned because it imposed a tax upon corporations not imposed upon individuals and partnerships. In the *instant* case the Kentucky Statute imposed a tax upon the shareholders of corporations having not more than 74% of their property in the State, while omitting to tax the shares of stockholders of corporations having 76% or more of their property in the State. Manifestly, the selection of the criterion between taxability and non-taxability of shareholders was perfectly arbitrary, and not founded on any basis having reasonable, or, indeed, any relation to the subject of the legislation.

The position of the dissenting opinion sharply points the contrast between the position of the Cab Company and that of the State. The dissenting opinion declared (p. 405):

> "The fundamental question requiring decision is a general one. Does the equality clause prevent a State from imposing a heavier burden of taxation upon corporations engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrower question presented is, whether this heavier burden may be imposed by a form of tax 'not peculiarly applicable to corporations.' That is, by a tax of such a character that it might have been extended to individuals if the legislature had seen fit to so do."

The decision of this Court, therefore, was that a heavier burden could not be imposed upon corporations than upon individuals by a form of tax "not peculiarly applicable to corporations," or, as stated in the dissenting opinion, "a tax of such a character that it might have been extended to individuals if the Legislature had seen fit to do so."

The tax imposed by Pennsylvania was, therefore, a tax which the Legislature might have extended to individuals had it seen fit to do so, but which it arbitrarily determined not to impose—and the legislative action was condemned by this Court. Its action was arbitrary, as was the action of the Kentucky Legislature in arbitrarily selecting first 25% of the corporation's property, and afterward 75% of such property as criterion for State taxation.

A prominent statement of the dissenting opinion further sharply emphasizes the issue decided by this Court in the Cab case, viz. (p. 406):

"The difference between a business carried on in corporate form and the same business carried on by natural persons is, of course, a real and important one. As was stated in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 161, 162, 'it could not be said * * * that there is no substantial difference between carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals.' Because of this difference Congress has repeatedly discriminated against incorporated concerns and in favor of the unincorporated."

An examination of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, shows that all the references therein made which are quoted *supra,* were made with reference to excise taxes, and can, therefore, have no application to the *instant* case which involves solely a property tax. The language in the Flint case in regard to classification of the subjects of taxation refers to excise taxes based upon the existence of the privileges enjoyed by corporations and not by individuals, and could not apply to the *instant* case where the corporations whose stockholders are exempted have the same privileges as the corporations whose stockholders are taxed—the criterion between taxability and non-taxability being

selected arbitrarily and based solely upon the amount of the corporation's gross taxable property in the State, *which amount has no reference whatever to the percentage of the corporation's property within the State in comparison with its total property there and elsewhere,* much less to a comparison of *net* assets. The criterion in the Kentucky statute is therefore selected arbitrarily, and without any regard whatever to any fact, circumstance or condition reasonably applicable to the subject of the legislation.

If the criterion selected under the Kentucky Statute for taxing the stockholders of some corporations and omitting to tax others be upheld, then there is no conceivable percentage of a corporation's property that might not, with equal propriety, be selected as the criterion of taxation as that which was selected by the Kentucky Statute. Twenty-five per cent was first selected, then 75 per cent. Any other percent may hereafter at any time be selected if the Statute be upheld.

If any discrimination whatsoever might be made in taxation in favor of the individual against a corporation on the ground that it is a corporation, although the basis of the discrimination has no relation to any characteristic or privilege of the corporation, then the equal protection clause of the Fourteenth Amendment, it seems to us, might as well be abrogated—indeed would be abrogated. The same, we submit, would be true if a State might distinguish between two corporations in the taxation of its stockholders where the

ground of distinction would be as applicable to the stockholders of one corporation as the other.

To enact, consequently, that the stockholders of a corporation having 74% of its property in Kentucky should be taxable while the stockholders of a corporation having 76% would be non-taxable—or *vice versa*—establishes a criterion of taxability having no relation whatever to the peculiar features of corporate entity, or privileges, and is purely arbitrary.

It is, therefore, we submit, clear that the principles established in the *Louisville Gas & Electric* case and the *Quaker City Cab case* prove that Section 4088, Kentucky Statutes, as amended in 1924, violates the equal protection clause of the Fourteenth Amendment, and is unconstitutional.

Other late cases such as *New York* v. *LaTrobe,* 279 U. S. 421; *International Shoe Co.* v. *Shartel,* 279 U. S. 692, and *White River L. Co.* v. *Arkansas,* 279 U. S. 692, decided questions, and announced principles, irrelevant to those involved in the *instant* case. In the last-named case the Court distinguished the *Quaker City Cab* case discussed *supra.*

## CONCLUSION.

The Fifth Amendment to the Constitution is an article of the Bill of Rights, and the Fourteenth Amendment, as now invoked, is but the extension of the principle of the Bill of Rights to the States. The equal protection clause of the Fourteenth Amendment is the shield of the people against arbitrary and tyrannical

legislative action. If the Legislature can arbitrarily select which members of a class it will tax and which members thereof it will exempt, then that clause of the Fourteenth Amendment is a dead letter. The importance of this case therefore is paramount as effecting future taxation. A reversal is respectfully prayed.

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# APPENDIX.

Sec. 4085, Carroll's Kentucky Statutes, 1915 Edition, c. 108, p. 2068 (Acts 1906, c. 22, Art. IV, Subdiv. 1, Sec. 9, p. 132).

"Sec. 4085. (9) *Property to be assessed in name of corporation—penalty for failure to report—exemption of stockholders.* The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation."

Sec. 4088, Carroll's Kentucky Statutes, 1915 Edition, c. 108, p. 2070 (Acts of 1906, c. 22, Art. IV, Subdiv. 1, Sec. 12, p. 132).

"Sec. 4088. (12) *When Stockholders are exempt.* The idividual stockholders of the corporation which are, by this article, required to report and pay taxes upon their corporate franchise, shall not be required to list their shares in such companies so long as the corporations pay the taxes on the corporate property and franchises as herein provided."

Kentucky Statutes, Sec. 4088, Carroll's 1922 Edition (Acts May 2, 1917, c. 11, Sections 2 and 3, p. 45).

"2. *Property to be Assessed in Name of Corporation—Penalty for Failure to Report.* The property of all corporations, except where differently provided by law, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report under oath a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties provided by law for a similar failure by a natural person in listing his own property."

"3. *Exemption of Stockholders.* The individual stockholders of a corporation, at least one-fourth of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky (including the corporate franchise when the franchise is required to be assessed), provided the shareholder furnishes satisfactory proof to the taxing authorities that at least one-fourth of the total property of such corporation is taxed in Kentucky."

Ky. Stat's. sec. 4088, Carroll's Ed. 1930. (Acts March 4, 1924, c. 116, p. 402, Sec. 2 and Sec. 3.)

"Sec. 2. That section 3 of chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, approved May 2, 1917, be amended by repealing said section 3 and inserting in lieu thereof the fol-

lowing, so that when said section is amended by substituting and re-enacting the following in lieu thereof, the same shall read as follows:

"Sec. 3. The individual stockholders of a corporation, at least seventy-five (75%) per cent of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky (including the corporate franchise when the franchise is required to be assessed), provided the shareholder furnishes satisfactory proof to the taxing authorities that at least three-fourths of the total property of such corporation is taxed in Kentucky."

Sec. 4123 Carroll's Kentucky Statutes, 1930 Edition.

"*Sec. 4123. Reconvening to hear complaints; witnesses.* The board, in reassembling, shall hear all complaints and pass upon the assessment of all taxpayers, and for that purpose the board, in counties having therein a city of the first or second class, shall remain in session not less than one nor more than ten days, and in other counties not less than one nor more than five days. The board may summon and swear witnesses and require them to testify. Any person who shall wilfully fail to obey the summons of the board or shall refuse to testify before it when required shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100.00) for each of-

fense." (Id. Sec. 9, as amd. April 11, 1917, c. 1, p. 3, Sec. 27.)

"*Sec. 4128. Errors do not invalidate assessment; appeal.* Any informality or irregularity in the execution of their duties as supervisors and any failure of duty on their part shall not render any assessment invalid. But any taxpayer feeling himself aggrieved by the action of said board of supervisors may appeal to the quarterly court within thirty days after the final adjournment of said board by filing with the judge of said court a certified copy under the hand of the clerk of said board of the action of said board. He shall have the right to appeal from the decision of the quarterly court to the circuit court and then to the court of appeals in the same manner that the law now allows appeals in civil cases. It shall be the duty of the county attorney to represent the board in all such suits pending before the quarterly or circuit court, and it shall be the duty of the attorney general to represent the board in the court of appeals. When any such appeal is taken it shall be the duty of the county attorney to forthwith notify the state tax commission in writing of such appeal, and if he fails to so notify the state tax commission within ten days after such an appeal has been taken to the quarterly court he shall be guilty of a misdemeanor and upon conviction may be fined in any sum not to exceed one hundred dollars ($100.00). If the county attorney or sheriff feel that the state, county or any taxing district has been aggrieved by the action of the board of supervisors, or on account

of the failure of said board to act, then either of said officers may appeal to the quarterly court by filing with the judge thereof a brief statement showing the action of the board of supervisors or stating wherein it failed to properly act. The quarterly court shall hear evidence and pass upon all such appeals and either of said officers or tax commission may appeal to the circuit court and then to the court of appeals the same as in other civil cases. It shall be the duty of the county attorney to represent the interest of the state and county in all such appeals in the quarterly and circuit court, and it shall be the duty of the attorney general to represent the interest of the state and county in the court of appeals. Where an appeal is taken by the county attorney or sheriff as herein provided, it shall be the duty of the county attorney to notify the state tax commission in like manner as when an aggrieved taxpayer appeals, and if he fails so to do he shall be subject to a like penalty." (Id., Sec. 14, as amd. April 11, 1917, c. l., p. 3, Sec. 32.)

Section 4189-1, 4189-2 Carroll's Kentucky Statutes, 1930 Edition, (Acts 1926, c. 74, Sections 1 and 2).

"*Section 4189-1. License tax on corporations.* Every corporation organized by or under the laws of this or any other state or government, owning property or doing business in this state, except foreign insurance companies, whether fire, life, accident, casualty or indemnity, foreign and domestic building and loan associations, banks and trust companies, and corporations

which, under existing laws, are liable to pay a franchise tax, shall pay to this State, to be credited to the general expenditure fund, an annual license tax based upon the asset value of its capital stock, as hereinafter provided.

"*Section 4189-2. Amount of tax.* Every corporation shall pay an annual license tax of seventy cents on each one thousand dollars of that part of the asset value of its capital stock represented by property owned and business transacted in this state, which shall be ascertained by finding the proportion that the property owned and business transacted in this state bears to the aggregate amount of property owned and business transacted in and out of this state.

"Provided, that such corporation may pay at said rate upon the entire asset value of its capital stock; and in that event it shall not be required to report as in subsection b of Section 4189-3 hereof. And its failure so to report shall be deemed conclusive evidence that such corporation elects to pay upon the entire asset value of its capital stock, and it shall be its duty so to do, and the duty of the state tax commission so to fix its license tax accordingly."

Judicial Code, Sec. 237, Par. A. (United States Code, Title 28, Sec. 344—Amd. Sec. 861a-b.)

"*344. (Judicial Code, section 237, amended). Appellate jurisdiction of decrees of State courts; certiorari.* (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity

of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

"*Sec. 861a. Writ of error abolished; substitution of appeal.* The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"*Sec. 861b. Statutes governing writs of error to apply to appeals.* The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

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CHARLES ELMORE

# Supreme Court of the United States

OCTOBER TERM, 1929.

No. 11

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JUNIUS C. KLEIN, - - - - - - - Appellant,

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - Appellee.

---

## REPLY BRIEF FOR APPELLANT.

---

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# Supreme Court of the United States

OCTOBER TERM, 1929.

**No. 442.**

---

JUNIUS C. KLEIN, - - - - - - - *Appellant,*

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - *Appellee.*

---

## REPLY BRIEF FOR APPELLANT.

---

### STATEMENT.

In our original brief, after complying with all the requirements of the rules of this Court (pp. 1, 4, 13), we treated the question of *equalization,* affecting about 30% of the assessment (p. 14); and we discussed (pp. 16, *et seq.*), as preliminary, or "inducement" to the main question, the taxation of property outside the State by indirection, and the unsoundness of double or multiple taxation generally. This we did upon the assumption that the Court would by reason of such discussion of those points, involving the citation of applicable authorities, be assisted in the determination of the main point involved in this case (p. 29), *viz.,* a denial to appellant of the equal protection provision of the Fourteenth Amendment.

## REPLY ON OPPONENT'S CLAIMS ON EQUALIZATION.

Upon our attention's being called to it by appellee's brief (pp. 14, *et seq.*) we note that our statement in our brief (p. 15) is not as clear as it might have been. We did not mean that appellant owned land assessed at 100% while other land in Jefferson County was assessed at 69.9%, but intended to suggest that there would be a denial of equal protection if the land of one were assessed at 100% while the lands of others were habitually assessed at 69.9%, and that, therefore, the fact that the land of one was assessed *by one Board, and the land of another by a different Board,* was immaterial (*Greene, &c., v. Louisville & I. R. Co.,* 244 U. S. 499, and companion cases).

The real point on equalization, however, does rest (as appellee contends) on the construction of Kentucky Constitution, Section 171, as amended, 1915 (appellee's appendix, pp. 130-133).

It is our contention that while that section, as amended, requires levy and collection of taxes "uniform upon all property *of the same class,*" and permits the Legislature to "divide property into classes" and determine what class or classes of property shall be subject to local taxation; and may assess (if authorized by referendum) the imposition of one tax rate upon one class and a different tax rate upon another, there is no more authority *to assess values of different properties at different percentages of real value now than there was before the adoption of the Amendment of 1915,* nor

has the Legislature attempted to authorize the *assessment* of one class of property at 100% while another class is *assessed* at 69.9% of its value, nor to authorize assessors to determine what class of property shall be assessed at 100% and what other class at 69.9%, or any other per cent. Indeed, by such a scheme of unequal assessment the assessors might thwart the legislative scheme of fixing particular rates of taxation.

We submit, therefore, that there is nothing in the 1915 Amendment that takes our case out of the principle expounded by this Court in *Greene* v. *Louisville & I. R. Co., supra.*

Opponent quotes extensively Ben Marshall's deposition (brief, 24, 27, *et seq.*), apparently overlooking the *findings of law and facts* (R. 43, *47*) where the Court said:

> "The Court further finds that the only other fact presented in the case is contained in the deposition of Ben Marshall, Secretary of the State Tax Commission of the State of Kentucky, which fact *the Court finds to be* that the assessment of real estate by the assessing authorities of the State of Kentucky, in the County of Jefferson, State of Kentucky, for the year 1925, as of July 1, 1924, was had and made on the basis of 69.9% of its fair cash value, estimated at what it would bring at a fair voluntary sale thereof, and that the ratio, or average, of the assessments for taxation of real estate in all of the counties of the State of Kentucky, for said year 1924, was between 65% and 70% of the fair cash values of same." (Italics ours.)

Our claim of discrimination is based upon the finding of facts by the Trial Court, upon which the judgment of the Court of Appeals was based, and we submit that the speculations of the witness in cross and redirect examinations cannot affect the State Court's findings.

Confessedly, therefore, appellant's stock was assessed at 100%, and the findings of fact by the State Court show that land in Jefferson County was assessed at 69.9% of its fair cash value, and land in other counties of the State at between 65% and 70% of that value. There was, therefore, a denial of the equal protection of the laws to appellant to the extent of 30 or 35%.

*Of course the question of equalization is only a subordinate question in case the Court should reach a conclusion adverse to our claim under the Fourteenth Amendment.*

### *Fourteenth Amendment.*

On the main point in controversy, the equal protection of the laws, we showed (Brief, 34, 35) the history of legislative provisions for taxing shares of corporate stock, reciting the legislation prior to 1917 (Ky. Stats. 4085), the Amendment of 1917 (Section 4088), and the Amendment of 1924 (Section 4088 as revised).

*We showed (Brief, 29) that the discrimination between corporations in taxation upon its shareholders was serious and grievous.* We showed (Brief, 30, *et seq*). that the State Court originally (in the *Siler case,* 221 Ky. 100—May 31, 1927) upheld the statute which we now assail, upon the authority of the *Middendorf*

*case*, 202 Ky. 118 and *Louisville Gas & Electric Co.* v. *Shanks, Auditor,* 213 Ky. 762, and that this Court (277 U. S. 32) has since the decision in the *Siler case* reversed the State Court's decision in the *Louisville Gas & Electric Co.* case. In other words, we showed that the State Court based its decision in favor of the 1924 Amendment upon its previous decision upholding the Registry Statute (a section of the Act of 1917) which this Court condemned in 277 U. S. 32. We showed also that the State Court, after this Court's decision invalidating the Registry Act, declared in the *instant case* (R. 58—230 Ky. 187) that it was unable to see that this Court's decision on the Registry Act had any application to the *instant* case.

We reviewed (Brief, 37, *et seq.*) the State Court's decision in the *instant* case, showing that its reasons for its decision of the Federal question were totally insufficient to justify the conclusion reached; and by review of the late decisions of this Court (Brief, 41, *et seq.*) we showed that the taxation of resident stockholders in some corporations, while stockholders in others were not taxed,—*a discrimination based solely upon the amount of the corporation's gross assets in the State*—violated the equal protection clause of the Fourteenth Amendment. See among other cases:

*Louisville Gas & Elec. Co.* v. *Coleman, Auditor,* 277 U. S. 32;
*Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389;
*Liggett* v. *Baldridge,* 278 U. S. 105, 113.

We showed also that the criterion of *gross assets* was as remote from a reasonable basis for discrimination as was *"authorized stock"* in *Air-Way Electric Co.* v. *Day*, 266 U. S. 71 (Brief, 42).

## REPLY TO OPPONENT'S ATTACK ON SECURITY HOLDERS BASED ON MATTERS DEHORS THE RECORD.

Opponent, the Attorney General, not only assails all our positions most industriously, but expresses amazement at the lack of understanding and greed of our client. Indeed, he savagely attacks the entire class of owners of intangibles to which appellant belongs.

He declares (Brief, 44) the appellant "incapable of distinguishing between the value of an obligation of a person or a corporation and the property that is owned by that person and the corporation."

He says (p. 51):

> "* * * we can see no reason why these principles (of Kidd v. Alabama) should be overturned simply because the petted and pampered owners of intangible property desire to be freed from all obligation of contributing to the support of the State governments that give legal life, vitality, and protection to their property, and who are the first and most exacting people in demanding from the State the protection of their property rights."

He says (p. 70):

> "He cannot understand that the physical property of the corporation constitutes its assets while

a share of stock in the hands of a shareholder is a liability of the corporation."

He says (p. 70):

"Appellant at last has given this Court the reason for this suit. He thinks it a crime for Kentucky to collect from him any tax. He honestly believes that Kentucky should exempt his property, but collect taxes from the other fellow to pay the cost of protecting his property."

Why the Attorney General should become so excited, or so embittered against the appellant and his class of security holders for contesting the Commonwealth's right to impose an unconstitutional tax, is not apparent. Surely it is not improper to attack an unconstitutional tax when we see the alarming rate at which taxes are increasing, and realize that if the *ratio* of taxes to income continues to so increase disaster must overtake us.

On the *instant* point the State's general right to tax the holder of shares is assumed.

The Attorney General speaks fluently of the expensive "protection" afforded by the State to appellant's shares as if it were possible for the State to extend any such protection. Appellant's shares are valid without even a certificate, and if appellant had a certificate it might be in Kentucky, Indiana or any other State. Kentucky would not even know of its whereabouts or its existence.

The claimed "protection" which seems to have given opponent such concern, as requiring *so extensive*

*an expenditure of money,* could not be discovered by an ordinary imagination. But, as aforesaid, we are assuming here the State's general right to tax shares.

The Attorney General criticizes appellant and his class as "petted and pampered owners of intangible property," and as "most exacting" in demanding the State's "protection" thereof, but he was compelled to admit that the Legislature in 1917 found it necessary to limit the tax upon intangible property *in order to get any to protect. The State ran after intangibles, and its speed was such* that intangibles increased from $68,750,880 in 1917 to $246,358,379 in 1918, and $495,506,610 in 1928 (appellee's Brief, 4). The Attorney General (Brief, 5) unwittingly explains that intangibles pay 50c in Louisville while tangibles pay $3.05. Of course, a $100 bond bearing $3.50, $4.00, $4.50 or $5.00 interest cannot pay $3.05 taxes! The Commonwealth, therefore, was driven to appoint a Committee to study and report, and to call its Legislature in *extra session* to devise means to bring into Kentucky that "petted and pampered" capital so essential to the development of the State, and so important as property to be taxed.

The taxation of $495,506,610 (almost $500,000,000) afforded a great relief to tangible property, which without the intangibles must have borne the burden of governmental expenses alone.

We apologize, however, for noticing such extraneous matters, and promise not to so offend again.

## EXPLOSION OF OPPONENT'S FALLACY IN TREATING CORPORATE STOCK AS A NOTE OR OBLIGATION.

As just quoted, opponent says of us (p. 71):

> "He cannot understand that the physical property of the corporation constitutes its assets while a share of stock in the hands of a shareholder is a liability of the corporation, in that it is an obligation upon which it is morally and legally bound to earn and pay to its owner dividends."

On page 33, opponent illustrates his position by treating a share of stock as if it were a *note*. He did not pursue his illustration, however, to its logical result for if a share of stock is, as he claims, an obligation like a note, then if Kentucky taxed notes held by residents of Kentucky, or omitted to tax them, depending upon whether or not the maker of the note owned property in Kentucky, or owned the specified and required amount, then, demonstrably, the statute would offend the Fourteenth Amendment. Such selection of the criterion of taxation would be entirely arbitrary and have no relation whatever to the subject of the legislation.

For illustration, if John Snooks, domiciled in Kentucky, held three notes, one made by Fred Lutz, of Ohio (25% of whose property was taxable in Kentucky); another by Robert Rich, of Indiana (75% of whose property was taxable in Kentucky); and the third made by Zeb Poore (none of whose property was taxable in Kentucky),—but all three of which makers

were amply solvent—the Kentucky Statute taxing notes held in Kentucky if the maker owned less than 75% of his property taxable in Kentucky (taxing two of the notes aforesaid and exempting the third) would clearly deny to the holder of the notes the equal protection of the laws as to the notes taxed, for the criterion of taxation would be absolutely arbitrary.

### KIDD v. ALABAMA SHOWN INAPPLICABLE TO THE INSTANT CASE.

The case most relied on by appellee is *Kidd* v. *Alabama,* 188 U. S. 730.

The State there sued the shareholder for taxes on stock of railroad companies *incorporated in other States,* and the shareholder defended on the ground that no similar tax was levied on the stock of domestic railroads or of foreign railroads doing business in the State. In taxing the stockholders of domestic railroad companies and foreign railroad companies doing business in the State, the statute, set out in the APPENDIX, elaborately specified the method to be adopted in the assessments, and authorized deductions from assessed value of the shares of the aggregate amount of the assessed valuation of the real and personal property of the railroad companies assessed in the State. In as much as the shares of the plaintiff-in-error were in a foreign corporation neither having property nor doing business in Alabama, the plaintiff-in-error obtained no deductions in the valuation of his shares and complained that he was for that reason denied the equal

protection of the laws. What this Court said, therefore, must be construed in the light of the facts of the case. The State Court affirmed judgment for the State on authority of *State* v. *Kidd*, 125 Ala. 413, and the shareholder sued out a writ of error. This Court affirmed the judgment of the State Court. It said (p. 731):

> "If the argument went further and denied the right to tax on fiction at all, and therefore denied the right to tax foreign stocks, it would seem to us to have more logical force, although we are far from implying that it would be unanswerable, or that it can be regarded as open. Very likely such taxes can be justified without the help of fiction. *Sturges* v. *Carter*, 114 U. S. 511; *Dwight* v. *Boston*, 12 Allen, 316; *Dyer* v. *Osborne*, 11 R. I. 321. But the argument does not go to that extent, and, limited as it is, the proposition that the plaintiff in error is denied the equal protection of the laws for the reason which we have stated strikes us as wholly without force. We see nothing to prevent a State from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the State must tax the stock held within the State if it is to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock, it may take into account that the property and franchises of the corporation are untaxed,

on the same ground that it might do the same thing with a domestic corporation. There is no rule that a State cannot look behind the present net values of different stocks. See *American Refining Co.* v. *Louisiana,* 179 U. S. 89."

After declaring that Alabama was not concerned with the taxing laws of other States, and that it would be fortunate if conflict between States could be avoided, this Court said (p. 732):

"But the Constitution of the United States does not go so far. *Coe* v. *Errol,* 116 U. S. 517, 524; *Knowlton* v. *Moore,* 178 U. S. 41; *Dyer* v. *Osborne,* 11 R. I. 321, 327; *Cooley Taxation,* 2d ed. 221, n. One aspect of the problem was touched in the case of *Blackstone* v. *Miller,* at the present term. 188 U. S. 187."

Mr. Justice Harlan and Mr. Justice White dissented.

*Blackstone* v. *Miller* was overruled in *Farmers L. & T. Co.* v. *Minnesota,* 280 U. S. 204, followed by *Baldwin* v. *Missouri,* 281 U. S. 586;—and *Sturges* v. *Carter* was not decided upon a Federal question but upon interpretation of the Statutes of Ohio. The Court there said (114 U. S. 521):

"The case, therefore, depends upon the construction of the statute. * * * The controversy on this part of the case is, therefore, reduced to the question, whether the legislature has clearly and unmistakably expressed the purpose in the act under consideration to exempt from taxation shares

in a foreign corporation owned by residents of Ohio, when but a small part of the property of the company was subject to taxation in Ohio."

In discussing the question the Court relied upon *Jones* v. *Davis,* 35 Ohio St. 474.

In order to manifest the applicability to the *instant* case of what this Court said in *Kidd* v. *Alabama,* opponent has gone elaborately into reports of the Kentucky State Tax Committees and evolved an ingenious theory from some quotations therefrom (Brief, 77, *et seq.*). He has thus justified the Act of 1917 fixing 25% as the amount of property which the corporations must have had in Kentucky to make non-taxable the stock of its shareholders; and he has justified the Act of 1924 fixing 75% of taxable property in Kentucky as the criterion of non-taxability by his comparison (Brief, 80, 81) of the situation which he deduces as existing in 1917 and the situation deduced by him in 1924. He concludes (Brief, 77, *et seq.*) that only about 20% of tangible personal property was assessed in 1917,—and intangible property hardly assessed at all,—and that 75% was assessed in 1924, so that the 75% criterion in the Act of 1924 was just as appropriate as was 25% as the criterion in 1917 of taxability of shares of stock.

Opponent says (Brief, 80, 81) that if appellant had examined certain pages of the report of the Tax Commission for 1923—

"* * * he would have discovered the reason why the 1924 Legislature by Chapter 116 of the Acts for

that year raised the percentage of property upon which a corporation was required to pay taxes, *because* its share of stock in the hands of shareholders could be exempt from taxation from 25% to 75%. This table discloses that the total assessed valuation of all the property of Kentucky in 1916 was $902,304,436, and that the valuation of this property had been continuously increased until in 1923, its total valuation was $2,205,588,007. Between the years 1916 and 1923 the valuation of the property of Kentucky had been *trebled,* and, in order to require the corporations operating in this State to be entitled to and have their stock exempted from taxation, since natural persons had *trebled* the valuation upon their property, it was nothing but fair that the corporation should be required to pay taxes upon at least three-fourths of their corporate assets before their shares should be entitled to exemption."

We submit that this proves absolutely nothing:

*First,* it does not prove that "natural persons had trebled the valuation upon their property." Opponent had shown that intangibles had increased as is above noted, from $68,750,880 in 1917 to $246,348,379 in 1918, the next year, and to $495,506,610 in 1928. Also, that bank deposits had increased from $11,177,196 in 1917 to $179,143,180 in 1918, the next year, and to $360,214,474 in 1928.

What part of the intangibles and what part of the bank deposits belonged to "natural persons" as distinguished from corporations, *quaere?*

*Secondly,* if the $902,304,436 total property in 1916 all belonged to natural persons (preposterous), and the $2,205,588,007 in 1923 all belonged to natural persons (equally preposterous), that circumstance would be utterly immaterial to the propriety of raising the criterion of the taxability of shares of stock from 25% in 1917 to 75% in 1924.

*Thirdly,* if the increase in the total taxable property of the State from 1917 to 1924 could affect the taxability of shares *in any wise* it could, *at most,* only affect *the percentage of the value of the shares* which should be taxed. *It could not indicate what shares should be assessed at 100% and what shares not assessed at all.*

For illustration, if *shares* were assessed at 25% of their real value in 1917 and assessed at 75% of real value in 1924, the State might, peradventure, try to explain the phenomenon upon the hypothesis that the *ratio* of assessed value to real value had increased in the seven years elapsed from 25% to 75%, but the figures exhibited by opponent would have no efficacy to show that to obtain non-taxability of shares the corporation having 25% of its property in Kentucky in 1917 must in 1924 have 75% of its property in the State.

Moreover a Tax Committee's report of 1912 shows that property was assessed on the average in Kentucky prior to 1917 at 52% of its value, and that real estate was assessed in different counties at different percentages of value, so that the tax report showed nothing, if

indeed it were possible for it to show anything, upon which to base the 25% or 75% of corporate property as a criterion for taxability of shares.

In *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499; *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522; and *Illinois Central R. Co.* v. *Greene*, 244 U. S. 555, this Court had before it cases where Cochran, J., enjoined 40% of the Kentucky assessment against the Railway Companies upon the ground that property in Kentucky was assessed at not exceeding 60% of its value, and was assessed on an average at 52% as shown by the Tax Committee's report. Judge Cochran said (230 Fed. 228) that the Commission appointed March 15, 1912, after nearly two years, stated the average *ratio* of assessed value to true value of farm lands at about 52%.

Opponent, however, in his endeavors to show applicability of *Kidd* v. *Alabama* to the *instant* case has failed to comprehend the real decision in that case. To do so it is necessary to read the Alabama Statutes upon which the decision was based. This Court said (188 U. S. 731):

> "The statutes levying the tax in question are the Code of 1886, §453, cl. 13, and the Code of 1896, §3911, cl. 14."

(These statutes are quoted in full in the appendix.) The *Code of 1886, §453, cl. 13,* reads:

> "All other property real and personal not otherwise specified herein."

The *Code of 1896, §3911, cl. 14,* reads:

> "All other property real and personal not otherwise specified herein including cotton, pig-iron, and manufactured goods, and other things of value."

The main statute prescribing the method of assessing shares is found in *Vol. I, §2082, cl. 9 of the Alabama Code of 1907,* adopted by Act of July 27, 1907, and is copied in full in the appendix.

Clause 9 provides in part as follows:

> "9. Every share of any corporation * * * shall be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation, and not to the corporation. * * * and the assessor, after passing upon such assessments, shall deduct from the aggregate amount or sum at which the whole of the shares are assessed the aggregate amount or sum at which the real and personal property of the corporation is returned to the tax assessors for taxation, owned by such corporation, and the residue of value remaining after such deduction shall be the assessed value of the whole of such shares, and such residue, divided by the whole number of shares, shall constitute the value of each share for taxation, * * *. If the aggregate value of the shares does not exceed the aggregate value of the real and personal property of the corporation as returned to the tax assessor for taxation, then no tax shall be demanded or collected on the shares; * * *."

This legislation of Alabama, construed in *Kidd* v. *Alabama,* was so widely different from the Kentucky Act of 1924 that the decision in *Kidd* v. *Alabama* is totally inapplicable in the construction of the Kentucky Act.

As shown in our original brief (p. 40) the State Court accepted the fallacy of opponent when it said (R. 59—230 Ky. 187):

> "But a large part of the property in any state is never assessed at its fair value. This is known of all men, and so the Legislature, when it came to consider whether stockholders in corporations should be taxed, where the corporation had paid taxes on all its property, did not require that the taxes should be paid by the corporation upon 100% of its property, but fixed a basis of 75 per cent. The reason was to allow a margin."

This statement involved an utter misconception of the situation. The Legislature did not fix "a basis of 75 per cent" for assessing shares, but required the shares assessed at 100% of value. The State Court had become confused between assessing shares at 75% of real value and assessing shares at 100% of such value where the corporation had less than 75% of its property in Kentucky. Neither the theory of opponent nor of the Court can account, therefore, for assessing shares at 100% where the corporation has 74% of its property in Kentucky, and exempting the shares altogether where the corporation has 75% of such property in Kentucky.

Seeing that neither opponent nor the Court can show why the Legislature changed the *criterion* of taxability from 25% in 1922, or 1923, to 75% in 1924, it becomes apparent that the increase was made arbitrarily, and, consequently, in violation of the equal protection clause of the Fourteenth Amendment.

In as much as *Kidd* v. *Alabama,* 188 U. S. 730, is now shown to have no applicability to the *instant* case, it would seem unnecessary to review the numerous cases cited by opponent (Brief, 48, 49), but in order to show that *Kidd* v. *Alabama* does not impair our position we shall briefly review the cases which opponent cites.

**DISCUSSION OF CASES CITED BY OPPONENT AS REAFFIRMING KIDD v. ALABAMA.**

In *Wright* v. *Louisville & Nashville R. R. Co.,* 195 U. S. 219, the decision was that the laws of Georgia did not exempt from taxation shares of stock of a foreign corporation held by a Georgia corporation. This Court said (p. 219):

> "Taking into account the decision in *Kidd* v. *Alabama,* 188 U. S. 730, the power of the State to tax the shares is not denied, so far as the Constitution of the United States is concerned, but it is argued that the State has not attempted to use that power by its present constitution and laws."

The question decided in *Kidd* v. *Alabama* was not discussed.

The question in *Union, &c., Transit Co.* v. *Ky.*, 199 U. S. 194, 205, was the right of Kentucky to tax the cars of a Kentucky corporation which operated locally between points outside Kentucky. This Court, holding that no such right existed, said (p. 205) that there was a distinction in respect of liability to such taxation between tangible and intangible property, and said:

> "In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam,* and to hold that the property may be taxed at the domicil of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such has been the repeated rulings of this Court. *Tappan* v. *Merchants' National Bank,* 19 Wall. 490; *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Bonaparte* v. *Tax Court,* 104 U. S. 592; *Sturges* v. *Carter,* 114 U. S. 511; *Kidd* v. *Alabama,* 188 U. S. 730; *Blackstone* v. *Miller,* 188 U. S. 189."

In *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, 235, where a license was imposed upon *meat-packing* establishments, but the law did not extend to the sellers of meat nor to packing establishments other than meat, the Court, holding the classification reasonable, said (p. 235):

> "'A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intoler-

able burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings.' *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540, 562.

"And see *Cargill Company* v. *Minnesota,* 180 U. S. 452; *Kidd* v. *Alabama,* 188 U. S. 730," and other cases.

In *Michigan Central R. R. Co.* v. *Powers, Auditor,* 201 U. S. 245, 293, this Court quoted from the Circuit Court the general rule on the subject of this Court's invalidating acts of State Legislatures under the Equal Protection Clause of the 14th Amendment, quoting divers cases including *Kidd* v. *Alabama.*

In *Liverpool, &c., Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, the Court (p. 355) quoted from *Kirtland* v. *Hotchkiss,* 100 U. S. 491, and added, "See also *Kidd* v. *Alabama*" (p. 356).

In *Darnell* v. *Indiana,* 226 U. S. 390, the Court held that statutes taxing shares in foreign corporations (except national banks, etc.) did not offend the Commerce Clause.

The Court advanced a *quaere* whether or not the statutes offended the Fourteenth Amendment. The Court held that one not within the class said to be discriminated against could not raise the Federal question, and held that a State might tax the property of domestic corporations and the stock of foreign corporations in similar cases (citing *Kidd* v. *Alabama*).

Concerning that case this Court said (p. 398) that the case was pretty nearly disposed of by *Kidd* v. *Alabama,* adding:

"But it is said that the former decision does not deal with the objection that the statutes work a discrimination against stock in corporations of other States contrary to principles often recognized (*Darnell* v. *Memphis*, 208 U. S. 113). The most serious aspect of this objection is that the statutes of Indiana do not make allowance if a foreign corporation has property taxed within the State. But as to this it is enough to say that, however the statutes may be construed in a case of that sort, the plaintiffs in error do not show that it is theirs, and that as they do not belong to the class for whose sake the constitutional protection would be given, if it would, they cannot complain on that ground."

In *Hawley* v. *Malden*, 232 U. S. 1, this Court, dealing with the question of *situs* of shares of stock, said that a State *in creating corporations* had the right to provide for taxation in that State of all the shares of stock, and whether owned by residents or non-residents; that whether, in case of such a corporation, a statutory provision fixing a *situs* of shares for purposes of taxation by whomsoever owned would exclude taxation of those shares by other States in which the owners resided, *quaere*.

The Court said (p. 10) that whether the question of constitutional validity of the taxation in question had been definitely raised in this Court or not, the existence of the State authority had been invariably assumed; that in *Kidd* v. *Alabama* it was not disputed that the State was entitled to tax shares owned by its citizens

in foreign corporations; that the argument there was that the statute created an unconstitutional discrimination, and this point being found to be without merit, the tax was upheld.

In *Fidelity & Columbia Tr. Co.* v. *Louisville,* 245 U. S. 54, 58, a tax imposed by the City was upheld upon the ground that the owner of money deposited in a bank in St. Louis was domiciled in Louisville; that the State of the owner's residence had the right to tax notwithstanding the money taxed was deposited in a St. Louis bank. This Court said (p. 58):

> "But liability to taxation in one State does not necessarily exclude liability in another." (Citing *Kidd* v. *Alabama.*)

*Quaere* whether or not this decision would stand in view of the much later rulings of this Court in *Farmers L. & T. Co.* v. *Minn.,* and *Baldwin* v. *Missouri, supra.*

In *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 330, held that a State might tax a domestic corporation on the excess of the market value of its outstanding stock over the value of its real and personal property and certain indebtedness, although the corporation did no business within the State and had there no tangible, real or personal property, nor any papers by which intangible property was customarily evidenced, and that it was immaterial whether the tax was considered a franchise or property tax.

After reviewing many cases, including *Fidelity, &c., Co.* v. *Louisville, supra,* the Court said that it was suf-

ficient to say, in answer to the taxpayer's objections, that the Fourteenth Amendment did not prohibit double taxation (citing *Coe* v. *Errol; Kidd* v. *Alabama,* and *Fidelity & Columbia Trust Co.* v. *Louisville*).

In *Watson* v. *State Comptroller,* 254 U. S. 122, *124,* held that a statute imposing additional tax on transfer of certain kinds of securities held by decedent at time of his death, on which neither general property tax nor the alternate stamp tax had been paid during a fixed prior period, was based upon a reasonable classification of property and did not violate the equal protection clause of the Fourteenth Amendment; that the tax was neither a property tax nor a penalty.

This Court said (p. 124):

> "It is insisted that the tax is discriminatory because under it other property of the same kind bequeathed to persons standing in the same relationship to the decedent will not be taxed. But the power to classify for purposes of taxation is fully established. The executors admit, as they must, that a classification is reasonable if made with respect to the kind of property transferred; or, to the amount or value of property transferred; or, to the relationship of the transferees; or, to the character of the transferee, for instance as engaged in charity. (Citing *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 300, and other cases.) * * * Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is not necessary, as the plaintiff in error seems to contend, that the basis of the classification must be deducible from

the nature of the things classified,—here the right to receive property by devolution. It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.' (Citing *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, 354; *Kidd* v. *Alabama, etc.*) And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had during the decedent's life borne its fair share of the tax burden and that which had not?"

In *Citizens National Bank* v. *Durr,* 257 U. S. 99, 109, it was held that the State of Ohio might tax the membership of a resident of that State in the New York Stock Exchange.

This Court said, on the point involving *Kidd* v. *Alabama* (p. 109):

> "Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment (*St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 367-368); much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden. (*Kidd* v. *Alabama; Hawley* v. *Malden,* and the *Louisville case.*)

The authorities invoked by opponent as reaffirming *Kidd* v. *Alabama* do not show that *Kidd* v. *Alabama* has any application to the *instant* case.

The industrious Attorney General appears not only to have cited every case where this Court has mentioned *Kidd* v. *Alabama,* but he has referred to numerous

State Court cases (Brief, 50, 51) saying that such States have made the principle enunciated in *Kidd* v. *Alabama* an integral part of their tax systems; but in as much as we have shown that *Kidd* v. *Alabama* does not announce principles adverse to us in the *instant* case we shall not waste the time of the Court in reviewing the State Court cases thus cited in opponent's brief.

### DIFFERENTIATION OF OHIO OIL CO. v. CONWAY, 281 U. S. 146.

Opponent (Brief, 56) touches lightly *Ohio Oil Co.* v. *Conway*, decided April 14, 1930, 281 U. S. 146.

The opinion in that case discussed extensively the question of the right to classify objects of taxation. The case was a bill to enjoin enforcement of a State statute enforcing a severance tax upon the products of oil. This Court affirmed the Federal District Court.

The classification approved by this Court was based on "gravity," a technical term in the oil business, and this Court notes that gravity constitutes a criterion in the price of oil. It says (p. 152):

> "Gravity as used in the Statute, and in oil price quotations, is not specific gravity, but what is called Baumé gravity, under which the lighter the oil the higher the gravity."

After elaborating characteristics of oils, this Court says (p. 155):

"The quotations that are according to gravity have a rising scale of prices as gravity increases."

Again (p. 158):

"The complainant contends that the Statute of Louisiana, imposing a tax according to gravity, operates as an arbitrary discrimination; that it discriminates in a wholly unjustifiable manner between the oils of the North Louisiana and South Louisiana fields, and also between the fields producing asphalt base oils. * * *

"The applicable principles are familiar. The States have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. * * *

"With all this freedom of action, there is a point beyond which the State can not go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is gen-

> erally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Company* v. *Virginia,* 253 U. S. 412, 415; *Louisville Gas Company* v. *Coleman,* 277 U. S. 32, 37; *Air-Way Corporation* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240."

It is thus seen that this Court in the Conway case cited the late cases upon which we rely and the cases cited by this Court in those cases.

The authorities, therefore, cited by opponent have no effect to impair the argument made in our original brief.

## COLLATION OF DEFINITIONS OF PROPER CLASSIFICATION FOR TAXATION.

In *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, *415,* the Court announced a latitude of discretion in classification, and said:

> "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

In *Truax* v. *Corrigan,* 257 U. S. 312, *337,* the Court said:

> "Classification must be reasonable. As was said in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,*

165 U. S. 155, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis.' "

In *Air-Way Corporation* v. *Day,* 266 U. S. 71, 85, the Court said:

> "It is clear that the mere number of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made." (Citing authorities.)

In *Schlesinger* v. *Wisconsin,* 270 U. S. 230, *240,* the Court said:

> "A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid."

In *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, *37,* the Court said:

> "It (14th Amendment) does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circum-

> stanced shall be treated alike.' " (Citing Royster Guano Co. v. Virginia; Air-Way Corp. v. Day, and the Schlesinger case.)

In *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, *400,* the Court said:

> "The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' *Power Co.* v. *Saunders,* 274 U. S. 490, 493."

The definition of classification contained in the *Royster Guano Co. case* is repeated in *Louisville Gas & Electric Co.* v. *Coleman, supra,* where that case and others are cited.

In *Royster Guano Co.* v. *Virginia, supra,* the decision was in favor of the taxpayer, notwithstanding the Court there recognized that the discrimination made by the legislation was inadvertent and arose out of a comparison of two different statutes.

The *Air-Way Electric Company case, supra,* has been sufficiently reviewed in our brief (p. 42).

*Schlesinger* v. *Wisconsin, supra,* contains an important application of the principle of classification under the equal protection clause of the Fourteenth Amendment. State legislation had declared all gifts made within six years before death conclusively presumed to

have been made in contemplation of death and subject to inheritance tax. This Court declared the legislation an infraction of the Fourteenth Amendment (p. 240), saying that there was no adequate basis for the classification made, and—

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

**REVIEW OF POWER CO. v. SAUNDERS, 274 U. S. 490, AND CITY OF DANVILLE v. QUAKER MAID, 211 KY. 677.**

*Power Co.* v. *Saunders,* 274 U. S. 490, makes an interesting and important application of the equal protection clause of the Fourteenth Amendment. An Arkansas statute restricted venue in transitory actions against a domestic corporation to a county where it had a place of business or in which its chief officer resided; and venue in such actions against a natural person to a county where he resided or was found; but permitted similar actions to be brought against a foreign

corporation in any county of the State, and this Court held the legislation an infraction of the Fourteenth Amendment.

This Court said (p. 493):

> "It (the Fourteenth Amendment) does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

The Court said (p. 494):

> "The statutes mean foreign corporations doing business within the State by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. * * * So far as the plaintiffs in such actions (transitory actions) are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary."

In *City of Danville* v. *Quaker Maid,* 211 Ky. 677, 278 S. W. 98, cited in the *Quaker City Cab Co. case* (277 U. S. 394), the Kentucky Court held (1925) that $50 per year license imposed by ordinance, with $25 added for each additional employee more than two,

denied the Quaker Maid the equal protection of the laws because regular service groceries paid a license tax under the ordinance of only $12 per year, with $5 for each additional employee over two. The Court said (p. 679):

> "The details of credit and delivery are alone not enough to afford a reasonable basis for the classification attempted in this case."

It consequently appears that as late as 1925 the Kentucky Court was in accord with this Court on the true construction of the Fourteenth Amendment.

**REPLY TO OPPONENT'S CRITICISM OF APPELLANT'S CLAIM BASED ON LOUISVILLE GAS & ELECTRIC CO. v. COLEMAN, 277 U. S. 32.**

We are amazed at opponent's remarks (Brief, 90, 91):

> "The foregoing insinuation against the Court of Appeals of Kentucky and Commissioner Hobson, by appellant in his brief, is unfair, because the opinion in the Klein case, in neither the excerpt quoted from that opinion nor any other part of it states or suggests that the decision of this Court in the case of Louisville Gas & Electric Co. v. Coleman, *supra*, 'rested upon the ground that the long-time mortgages were made by corporations and short-time mortgages by the poor' or 'that the statute was void for taxing corporations and exempting individuals.' Neither did the opinion charge that this Court held 'that the statute taxed corporations and exempted individuals.' The excerpt

from the opinion, when construed fairly, only undertook to state what the Legislature of Kentucky, in adopting the mortgage recording tax, attempted to do, and that was to exempt the short term mortgages, which are usually executed by those in financial distress, and to tax the long-term mortgages, which are usually executed by corporations to a non-resident trustee as the basis for issuing a debenture bond, payable to bearer, with interest coupons attached. These were the two classes that the Legislature and the courts locally recognized in the passage of the mortgage recording act and its construction by the Court. *Locally the difference in the two classes was as significant as the difference between day and night, and Commissioner Hobson in the quoted excerpt was only stating a fact that was known and understood by practically every professional and business man of Kentucky."* (Italics ours.)

Opponent's temper which characterizes our discussion of the opinion of the State Court as an "insinuation" is unjustifiable. It has certainly never been considered by this Court that it was inadmissible for counsel to criticize the grounds upon which the lower Court decided the case. We offered no disrespect to the State Court nor to the Commissioner who delivered the opinion.

Concerning the justice of our opponent's remarks, we need only submit to this Court's perusal the excerpt which we made (Brief, 37) from the State Court's opinion (230 Ky. 187) (R. 59), and our comments upon it, in justification of our remarks.

We would especially observe, however, the latter part of the quotation which we have above made from opponent's brief, and his comparisons of the record in the *Coleman case* and the record in the *Citizens Telephone Company case* (Opp. Brief, 90, *et seq.*), and although we have not heretofore complained of the personal nature of opponent's language, nor of his basing his argument upon imaginary motives of the Legislature, we must protest against his not only rewriting the record in the *instant* case, but his rewriting that in the *Coleman case.*

**REPLY TO OPPONENT'S CONTENTION THAT IF THE AMENDMENT OF 1924 TO SECTION 4088, KY. STATS., WERE HELD UNCONSTITUTIONAL ALL KENTUCKY STOCKHOLDERS IN ALL CORPORATIONS WOULD BE TAXABLE.**

Appellee sounds us the alarm that if we establish what it claims to be our contention we shall nevertheless remain bound for the tax in controversy. It says (Brief, 94):

> "The main complaint of appellant in this case is that the exemption that is granted to a certain class of stockholders in Section 4088, Kentucky Statutes, is invalid. He states that this exemption is granted on an arbitrary classification. If this is true and the exemption is eliminated, then all stockholders will be required to pay the tax, and we cannot discover any advantage that would come to appellant by reason of invalidating the exemption under the 14th Amendment. This Court

would not undertake to invalidate the whole revenue measure because the exemption was invalid."

This is a *brand new* point. It was not made in the Court below, for that Court's elaborate opinion (R. 55-62) does not mention it.

The vice in appellee's position is:

*First,* in its assuming that our complaint is that it is an exemption contained in Section 4088, Ky. Stats., which is invalid, and

*Secondly,* in assuming that if Section 4088 were eliminated the shares of stock of appellant would be taxed under the Act of 1924. (a) Our complaint is not that there is an exemption contained in Section 4088, which is unconstitutional, but that the taxation of our shares when the shares of other corporations are not taxed makes taxation of ours unconstitutional. In other words, we claim that we are denied the equal protection of the laws by being taxed when shareholders in other corporations similarly circumstanced are not taxed. We, consequently, complain of the tax imposed on us.

(b) By holding Section 3 of the Amendment of 1924 (§4088) unconstitutional the shares held by appellant would not have thereby become taxable. Taxes are not imposed except by legislative command, and it is a cardinal principle of taxation, emphasized in Kentucky jurisprudence, that no tax exists except where imposed by positive legislation.

*Board of Frankfort, &c.,* v. *Fidelity &c. Trust Co.,* 111 Ky. 667.

*Same* v. *Frankfort, &c., Trust Co.*, 115 Ky. 660, 664.
*Aetna Life Ins. Co., et al.*, v. *Coulter, Auditor, et al.*, 115 Ky. 787-804.
*Commonwealth* v. *Dunn*, 126 Ky. 108, 111.
*Commonwealth* v. *Consolidated Casualty Co.*, 170 Ky. 103, 106.
*Semple* v. *Commonwealth*, 181 Ky. 675, 682.

In the *Frankfort case* the city attempted to tax the interest which the bondholders represented by the Trust Company owned in the mortgaged property in Frankfort. This Court had previously held in *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 422, that it was within the jurisdiction of the State to tax such an interest in realty within the State held by trustees for bondholders. It was accordingly contended by the city that the bondholders' interest in the mortgaged property, which was situate in the city, could be taxed by the city, on the ground that all property was taxable in Kentucky. The Court, however, held otherwise, saying that although the bondholders' interest in land situate in the State was an interest which might be made taxable, it was nevertheless not taxable because the Legislature had not made it taxable. This ruling, as aforesaid, was reaffirmed in the cases cited *supra*.

The *Frankfort case* was decided in 1901, long after the adoption of the Constitution of 1891 and the enactment of the Statutes of 1893 making general provisions for taxation of Kentucky property. It was established, therefore, as early as 1901 that shares of stock were

not taxable unless made so by positive legislation. The legislation on the subject was as early as 1886 (*prior to the present Constitution*), General Statutes 1887, Chapter 92, Art. IV, §8, as follows:

> "§8. That the individual stockholders of the companies which are by this article required to report and pay tax upon the value of their property, shall not be required to list their shares in such companies for taxation."

Before 1891 the previous Constitution (June 11, 1850) contained virtually no express limitations upon tax legislation.

The first statute on taxation after the adoption of the Constitution was the Act on Revenue and Taxation, November 11, 1892, Kentucky Statutes, Carroll's Edition 1899, pp. 1374-1396, §4088, as follows:

> "The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon the corporate franchise, shall not be required to list their shares in such companies so long as the corporation pays the taxes on the corporate property and franchise as herein provided."

The statutory provisions of Kentucky were, therefore, both before and immediately after the adoption of the Constitution, identical in effect with the subsequently enacted Section 4085 of the Statutes (see our appendix, p. 51).

The Act of 1924, *now assailed by us,* not only does not assume to make all shares of stock taxable, but *per*

*contra* shares of stock in corporations having 75% or more of their property in the State are by that Act expressly made non-taxable. They were not taxable under the Act of 1917, nor under any prior legislation, and are not now taxable. Indeed, until appellee's *instant* contention no one ever claimed that they were taxable. If they were now made taxable by Section 4088's being held unconstitutional, then they must have been taxable ever since the adoption of the Constitution of 1891 and the Acts of 1893, but, on the contrary, it was repeatedly held that they were not taxable under the Act of 1893, or 1906 (§4085), or under the Act of 1917 (§4088), or under the present Act of 1924 (§4088, as amended).

It thus appears that prior to 1917 it was provided (§4085):

> "and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation."

This statute was repeatedly upheld and construed by the highest Court of the State.

*Commonwealth* v. *Fidelity Trust Co.*, 147 Ky. 77.
*Slater* v. *Commonwealth,* 166 Ky. 250, 179 S. W. 201.
*Commonwealth* v. *Muir,* and
*Commonwealth* v. *Halstead,* 170 Ky. 435, 186 S. W. 104.

The case of *Commonwealth* v. *Walsh's Trustee,* 133 Ky. 103, is enlightening on the *instant* point. Miss

Clara Beall, afterward Mrs. Walsh, owned 500 shares of Western Union Tel. Co. stock and the State attempted to tax it. The trial Court held the stock nontaxable and the State appealed. The Court of Appeals gave an opinion reversing (p. 104). Upon petition for rehearing the former opinion was withdrawn and the trial Court's decision affirmed (p. 111).

The Court said (pp. 112, 114, 115):

> "Throughout the whole scheme of taxation adopted by this State there is an evident purpose to avoid double taxation, not alone in not taxing the same property twice in the same year for the same purpose, but as well in not taxing the same thing, whatever its form, twice in the same year for the same purpose. Double taxation is recognized as oppressive, and, where it is imposed upon some classes of property and not upon others, works an inequality that is fundamentally vicious. While the Constitution requires that all property shall be taxed (Const., Sec. 171) and the General Assembly is prohibited from exempting any property from taxation not specifically exempted by Section 170 of the Constitution, it is not required that every phase of property shall be taxed. *Nor is it. Nor has it ever been.* Property is the right to or interest in a thing. * * * *The manner of classifying* property for purposes of taxation, so as to tax all that is not exempted by the Constitution, *is a matter left to the legislative wisdom.* While it would be permissible without double taxation as that term is used, to tax the corporation upon its capital, and the shareholder upon his share, or the life tenant upon his estate, and the

remainderman upon his, whether the State should resort to that form, or to the simpler one of taxing once and at full value the thing which represents the various properties based upon it, *is a matter of legislative discretion always.* It may be remarked that no State taxes every right or interest in things which the law recognizes as property. * * * *In no instance does the State require the corporations and the shareholder* to each pay the tax upon the actual property, the title to which is in the corporation. *On the contrary, it is expressly provided in every instance that, where one pays the tax, the other need not. It is a misnomer to say that that is an exemption from taxation. It is not.* It is choosing the form of the property from among several forms it may have assumed, which the State prefers for its own convenience and security to lay the tax upon.

"* * * While it is true that the State may have taxed the franchise, which includes the capital of the corporation, and taxed also the shareholder upon his shares (Franklin Co. Ct. v. Deposit Bank, 87 Ky. 370), it has not done so. On the contrary, it has expressly said (Ky. St., Sec. 4088, *supra*) that so long as the corporation pays taxes upon its corporate franchise and property the shareholder shall not be required to list his shares in such company." (Italics ours.)

This language of the Kentucky Court is so clear, emphatic and comprehensive that comment is unnecessary.

It results that appellee's contention (in *terrorem*) that if the amendment of 1924 be held unconstitutional

then all shares of all corporations in Kentucky would be taxable, is not maintainable, and that its contention never was the law of Kentucky.

Moreover, inasmuch as the Standard Sanitary Mfg. Co., in which appellant holds the shares under discussion, had more than 25% of its property in Kentucky (R. 58) appellant's shares were not taxable under the Act of 1917. Consequently, if all the corporate shares were now taxable this could only be through positive command of the Act of 1924, and the provisions of that Act not only do not purport to tax them but, on the contrary, expressly make shares non-taxable unless the corporation has less than 75% of its property taxed in Kentucky.

The Act of 1924 does not purport to tax all shares of all corporations. It lays a 30c tax on real estate and a 50c tax not upon all other property, but upon "all other property directed to be assessed for taxation as provided by law" (appellee's appendix, p. 121). It then distributes the tax levied. The Act next provides repeal of Section 3 of the Act of 1917 and substitution of Section 3 of the Act of 1924 (pp. 123, 124). The Act then proceeds to repeal certain sections of the Act of 1917 and to substitute other provisions.

In the provisions under that Act for retrospective assessment of omitted property (appellee's appendix, p. 129), the property for back assessment is described as "money * * * or shares of stock *liable to assessment.*" (Italics ours.)

An analysis of the specific provisions of the Act, therefore, shows that it contains no positive imposition of taxes upon shares except as is expressed in the provisions hereinbefore recited.

Conclusive against appellee, however, on the *instant* point is that the point was not raised, and therefore was neither considered nor decided in this case by the State Court, and being a construction of State statutes this Court will not consider it. On the contrary, the entire opinion of that Court, as well as the decision which it made, was adverse to appellee's contention. Indeed, the State Court's act in deciding the Federal question was equivalent to deciding the *instant* question adversely to appellee.

Furthermore, the reasons given by the State Court, in its opinion, for its decision in favor of appellee prove that appellee's present contention is untenable, *for the State Court showed that under Kentucky law the shares in some corporations were taxable and the shares in others non-taxable,* something that could not obtain if the shares of *all* corporations were taxable, as is now claimed by appellee. For illustration, the State Court said (R. 59):

> "There is a substantial reason for putting stockholders in corporations not paying taxes in Kentucky on so much of their property on a different footing from those so paying taxes in Kentucky. When the corporation's property is all in Kentucky and its property is all assessed and the taxes are paid thereon, the property so taxed has

> in fact borne its fair share of the public burden. Not to assess the stockholders on his stock then is simply to treat the corporation as a firm is treated."

The State Court, in the language just quoted, so far from holding that all shares of stock were taxable, based its decision upon a classification of shares (some taxable and some non-taxable) which it held was not unconstitutional. The classification thus expounded by the State Court held taxable all shares where the corporation had less than 75% of its property taxed in Kentucky, *and non-taxable where the corporation had 75% or more of its property taxable in Kentucky.*

The State court's decision, consequently, in the *instant* case was exactly in line with the *Frankfort case* and the *Walsh case,* and the cases cited *supra* following the *Frankfort case.*

The State Court, in the language above quoted, in appellee's own case has conclusively decided the *instant* point against appellee, and the point is an afterthought.

An additional ground of decision against appellee is that if a decision affirming the unconstitutionality of Section 4088, as amended in 1924, had such effect as appellee claims, the result would simply be the revival of the corresponding section of the Act of 1917. That Act doubtless contained the same infirmity as the Act of 1924, *but has never been attacked, and is not now under attack.* If, however, Section 4088 of the Act of 1917, as well as Section 4088 of the Act of 1924, were

each tried and held unconstitutional the result would be to revive Section 4085 aforesaid, under which shares were not taxable so long as the corporation paid taxes on whatever property it had in Kentucky.

*Ward* v. *Commonwealth,* 228 Ky. 468, 471, and cases cited.

The Act of 1917 (*appellee's* appendix, p. 111) contains no such provision for separability as does Section 11 of the Act of 1924 (appendix, p. 131), but had it contained such a provision the result would have been the same.

If, as aforesaid, Section 2 of the Act of 1924, amending Section 3 of the Act of 1917, were held unconstitutional the effect would be to revive Section 3 of the Act of 1917. If, in turn, Section 3 of the Act of 1917 were held unconstitutional (but is not now on trial), the result would be to revive Section 4085 (Appendix *appellant's* brief, p. 57).

If Section 3 of the Act of 1917 were held unconstitutional the entire provisions of that Act respecting the taxation of shares would fall and, consequently, the provisions of Section 11 (*appellee's* appendix, p. 119), repealing Section 4085 and Section 4088, would fall. In any aspect of the case, therefore, Section 4085 would remain and appellant's shares would not be taxable. The reason for this result is clear, *viz.,* that the provision for repeal of Section 4085 was based upon the legislative intent in the Act of 1917 to tax only the shares of corporations having less than 25% of the corporation's property in Kentucky, *and there was no intent*

*to tax any other shares.* To hold otherwise than as we suggest above would commit the Legislature to taxing all shares in Kentucky, something which, as said in the Walsh case, had never been done, and as said *supra* taxation of any particular property must be by positive legislation.

*Commonwealth* v. *Hatfield Coal Co.,* 186 Ky. 411, 217 S. W. 125 (applying *Poindexter* v. *Greenhow,* 114 U. S. 270; *Spraigue* v. *Thompson,* 118 U. S. 90; and *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540).

*Felts* v. *Linton, Judge,* 217 Ky. 305, 310, 311, 289 S. W. 312.

The discussion of the repeal and revivor, however, is an alternative argument, and is merely corroborative of the argument previously advanced on this point, *viz.,* that positive legislation is essential to create taxation and that none exists, or ever has existed, in Kentucky that would tax appellant's stock except the un constitutional provisions of the Act of 1924.

**APPELLEE'S REASON WHY THE LEGISLATURE CHANGED SECTION 3 OF THE ACT OF 1917 REFUTED.**

Appellee indulges in its brief in much imaginative historical speculation *dehors* the record. It says (p. 98):

> "Thus the Legislature discloses that the 1924 amendment to Chapter 11 of the 1917 Act was adopted to equalize the burden of taxation. After the assessment of the property of individuals had been trebled it would have been unfair to other

property holders to have permitted shares of stock to be exempted when the corporation paid taxes to Kentucky on 25% of its tangible assets. So they raised the percentage of property to be taxed to 75%."

The record discloses nothing to support this statement, but, on the contrary, the tables in the appendix to appellee's brief show, and the introduction to the brief shows, why the Act of 1917 (passed in pursuance of the Amendment of 1915 to Constitution, Sec. 171) imposed a tax on intangibles which the holders thereof would pay, and repealed the absurd tax burdens previously existing and which owners of intangibles would not pay. Such owners would either refrain from owning intangibles or would conceal them, and in either case the State could not tax them. The history of the Act of 1917 as given by appellee establishes this statement.

It profiteth nothing to become excited over the immorality of the holder of a $100 bond, assessed at par and bearing 3½, 4½ or 5% interest, failing to pay a tax of $3.05 (appellee's brief, 5), because the Court judicially knows, what everybody knows, that the most progressive and enlightened States have recognized that holders of intangibles will not pay unreasonable taxes but will escape them honestly or dishonestly, because they can. It was, of course, in the intelligent recognition of this fact that the 1915 Amendment to Constitution, Section 171, was adopted, and the Act of 1917, imposing on intangibles only a State tax of 40c (now

50c) enacted. The result is recited by appellee (Brief, 4):

> "In 1917 bank deposits reported for taxation in Kentucky were $11,177,196. In 1918 they were $179,143,180. In 1917 intangibles were $68,750,880, while in 1918 the intangibles were $246,348,379. In 1928 bank deposits were $360,214,474 and intangible personal property $495,506,610."

The subject of taxation is, and in 1917 was, economic and not religious. Its treatment was by constitutional amendment and by Act of the Legislature. There is no justification or excuse, therefore, for attack upon appellant or any other holder of shares of stock residing in Kentucky. The tax laws of Kentucky were made by the Commonwealth and not by the shareholders.

## CONCLUSION.

We conclude that opponent's brief has in no wise impaired the case made by our original brief, and that our reply brief has not only answered the brief of opponent but has strengthened our original brief by further argument and citation of applicable decisions of this Court.

We submit that we have shown by the decision of this Court in the *Quaker City Cab Company case, supra,* and its decision to similar effect in divers other cases, that a discrimination in taxation in favor of an individual and against a corporation cannot be sustained except where the taxation upon the corporation or its property is based upon some characteristic of the

corporation not possessed by the individual, and that to hold otherwise would destroy the equal protection clause of the Fourteenth Amendment, the corporation being a "person" within the meaning of that amendment; and we submit that this principle applies with even greater force to a legislative attempt to discriminate arbitrarily between corporations themselves.

We submit that we have shown that *Louisville Gas & Electric Co.* v. *Coleman, Auditor, supra,* announces a principle exactly applicable to the *instant* case, because the classification of shareholders in the latter has no basis whatever except a difference in amounts of gross assets owned by the corporation situated in the State as a criterion between taxability and non-taxability.

Under the legislation assailed by us in the *instant* case the shares of stock in a corporation are taxable if the corporation has only 74% of its gross assets in Kentucky, while shares are not taxable if the corporation has 75% thereof in the State. Any amount other than 75% of such assets might have been selected with equal propriety, and would have been selected equally arbitrarily. The principle of the *Coleman case* is, consequently, exactly applicable, and is conclusive.

Again, we have shown (Brief, 29, 36) that *gross assets* can afford no just criterion for classification in cases like the *instant* case, and can afford a no more reasonable criterion for classification for taxation than "authorized" capital stock was permitted to show in *Air-Way Electric Co.* v. *Day, supra,* or the statutory

requirement of stock-holding in *Liggett* v. *Baldridge* (Brief, 42, 43).

The fundamental principle of the equal protection of the laws commanded by the Fourteenth Amendment has served as a bulwark against confiscation of property through discriminatory taxation and through ignorant or prejudiced rate-making for many years, as well as against other arbitrary or tyrannical legislation, and has been of inestimable value to the people. In times of stress or great excitement State Legislatures in the midst of a crisis not only welcome the consolation that this Court will review their work, but cheerfully pass on the responsibility to the State Courts or to this Court. Indeed, the protection which this Court has always given to the people under the Fourteenth Amendment has been invaluable.

We respectfully pray that the judgment appealed from be reversed.

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JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
*Counsel for Appellant.*

JOHN S. MILLIKEN,
*Of Counsel.*

## APPENDIX.

*Alabama Code of 1886, §453, cl. 13:*

"All other property real and personal not otherwise specified herein."

*Alabama Code of 1896, §3911, cl. 14:*

"All other property real and personal not otherwise specified herein, including cotton, pig-iron, and manufactured goods, and other things of value."

*Alabama Code of 1907, Vol. 1, §2082, cl. 9:*

"9. Every share of any corporation except banks or banking associations and building and loan associations shall be assessed and collected in the county wherein such corporation has its home or chief office in this state, and shall be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation, and not to the corporation. The president or chief officer of every such corporation shall make out and return under oath to the assessor of the county in which the chief or home office of the corporation is located, a list showing the total number of such shares of capital stock of such corporation and the par value thereof, and the full name and residence of each shareholder as far as known, the actual market value of such shares and the par value thereof, the date of the last sale of stock in such corporation, with the name of the seller and the purchaser, and the price paid for the same, and the annual dividend declared on the stock of such corporation for the last three years, the value of the shares as shown by the books of the corporation, and by the last report of the officers to the shareholders, the amount of the surplus; and the amount of the un-

divided profits not included in the surplus, and such president or chief officer shall at the same time return to the assessor a sworn statement of all taxable property, real and personal, owned by such corporation, situated in the State, and the value thereof as returned to the tax assessor for taxation the same year, and the assessor, after passing upon such assessments, shall deduct from the aggregate amount or sum at which the whole of the shares are assessed the aggregate amount or sum at which the real and personal property of the corporation is returned to the tax assessors for taxation, owned by such corporation, and the residue of value remaining after such deduction, shall be the assessed value of the whole of such shares, and such residue, divided by the whole number of shares, shall constitute the value of each share for taxation, and the corporation shall pay for the shareholders the tax assessed against his shares, and the amount so paid for any shareholder shall be a lien on any interest which such shareholder may have in any property owned by the corporation. If the aggregate value of the shares does not exceed the aggregate value of the real and personal property of the corporation as returned to the tax assessor for taxation, then no tax shall be demanded or collected on the shares; and no other deductions shall be made from the aggregate amount or sum at which the real and personal property of the corporation is returned to the tax assessor for taxation than is herein specifically provided for. It shall be no ground for objection to such assessment of shares that the same is entered upon the assessment books in the name of the corporation. In arriving at the value of the shares of stock of a corporation organized under the laws of Alabama for the purpose of conducting a fire insurance business for assessment, there shall be deducted from the value of such shares, in addition to the assessed value of its property, the amount of its bonds of the State of Alabama, any county or municipality thereof, and of the United

States, held by such fire insurance corporation at the time of such assessment, which was held during all the six months preceding such assessment; provided no shareholder of any corporation who shall pay a tax on franchise or intangible property shall be liable to the taxes specified in this subdivision as to the same property."

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IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1930**

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## No. 11

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JUNIUS C. KLEIN, ETC., APPELLANTS,

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, APPELLEES.

---

## SUPPLEMENTAL BRIEF OF APPELLANTS.

---

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JOHN S. MILLIKEN,
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## SUPPLEMENTAL BRIEF OF APPELLANTS.

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The State Court's opinion itself demonstrates that the statute which we assail makes a purely arbitrary classification and denies the appellant the "equal protection of the law" for the opinion cites cases (Rec. 56, 7) to prove that the State may tax both the corporation's property and the shareholder's shares; and then says (Rec. 59), "when the corporation's property is all in Kentucky and its property is all assessed and the taxes are paid thereon, the property so taxed has in fact borne *its fair share of the public burden.* Not

to assess the stockholders then is simply to treat the corporation as a firm is treated."

This can only mean that no double taxation is intended.

Then it follows that under the statute A's stock and his corporation's assets may be taxed 174 per cent, while B's stock and his corporation's assets are taxed only 75 per cent.

Respectfully,

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JOHN S. MILLIKEN,
*Of Counsel.*

FILE COPY

AUG 11 1930

# Supreme Court of the United States

OCTOBER TERM, 1929.

No. [redacted] 11

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JUNIUS C. KLEIN, - - - - - - - Appellant,

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - Appellee.

---

## BRIEF FOR APPELLEE.

---

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WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

# Supreme Court of the United States

OCTOBER TERM, 1929.

**No. 442.**

---

JUNIUS C. KLEIN, - - - - - - - *Appellant,*

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - *Appellee.*

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# Supreme Court of the United States

OCTOBER TERM, 1929.

**No. 442.**

---

JUNIUS C. KLEIN, - - - - - - - *Appellant,*

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - *Appellee.*

---

## BRIEF FOR APPELLEE.

---

*May it please the Court:*

### STATEMENT.

The present Constitution of Kentucky was adopted by a Constitutional Convention in 1891 and was thereafter submitted to and ratified by an overwhelming majority of the voters of Kentucky.

Section 171 of this Constitution originally contained the following sentences:

> "* * * Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

The insertion of the foregoing sentences in Section 171 of our State Constitution was vigorously opposed by the corporate and monied interests of Kentucky in the Constitutional Convention. When the Constitution was submitted to a vote of the people this interest sought to prevent its ratification, but the experience of the people under the old 1849 Constitution of Kentucky in having taxes pyramided upon real estate and tangible personal property while intangible personal property was escaping taxation, caused them to adopt the present Constitution of Kentucky by an overwhelming majority.

However, this organized interest was strong enough in every general assembly of Kentucky which met after the adoption of the present Constitution to prevent the Legislature from adopting any effective coercive statute that would force those holding intangible personal property to disclose to the assessing department of our State government their holdings of intangible personal property, and by perjury intangible personal property, to a very large extent, escaped taxation in the State of Kentucky from 1891 until the Legislature of Kentucky at its 1914 session, becoming desperate, submitted to the voters of Kentucky an amendment to Section 171 of the present Constitution of Kentucky, which amendment, among other things, contained the following sentences:

> "* * * Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the *same class* subject to tax-

ation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"The general assembly shall have power to *divide property into classes* and to determine *what class or classes of property shall be subject to local taxation.* Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation."

This amendment was ratified by the people at the November, 1915, election.

By common consent the 1916 session of the General Assembly omitted legislation upon taxation except for the levying of State taxes necessary to pay the running expenses of the State government, and on February 3, 1917, Governor A. O. Stanley called a special session of the General Assembly of the Commonwealth of Kentucky and by his proclamation limited their activities to the reformation of the taxing system of Kentucky. That Legislature, by Section 6 of Chapter 11 of the Acts of the 1917 Special Session (Section 4019a-12, Kentucky Statutes, 1922 edition), provided the first effective and coercive measure placed on the statute books of Kentucky after the adoption of the present Constitution, by which taxpayers were forced to reveal to the assessing authorities the amount and value of their intangible personal property. But, realizing the wholesale perjury that had been practiced by the owners of intangible personal property in the State of Kentucky in the past, the Legislature attached to the section above mentioned a provision, the purposes of which

were to give an *immunity bath* to the *tax dodgers of Kentucky* who had heretofore refused to reveal to the assessing authorities their holdings of intangible personal property. This provision is in words and figures as follows, to-wit:

> "Provided, further, that after September 1st, 1917, no action shall be commenced nor proceeding taken on behalf of the State or any county, city, town, or taxing district to assess for taxation for any period prior to September 1st, 1917, any personal property described in this section required to be listed for taxation which had theretofore been omitted or which may be claimed to have been omitted, if such property has been so listed for taxation as of September 1st, 1917; nor shall any pending action, prosecution, or proceeding be amended so as to include any such personal property listed as of said date."

The fixing of a penalty equal to 100% of the value of all property that the taxpayers failed to disclose to the assessing officers by Section 6 above mentioned, and the granting of the immunity bath to past tax dodging, produced marvelous results in the taxing system of Kentucky. In 1917 bank deposits reported for taxation in Kentucky were $11,177,196. In 1918 they were $179,143,180. In 1917 intangibles were $68,750,880, while in 1918 the intangibles were $246,348,379. In 1928 bank deposits were $360,214,474 and intangible personal property $495,506,610. (See 11th Annual Report Kentucky State Tax Commission, 1928, Table

No. 3, page 82, copied into Appendix hereto, on page 106.)

Another factor which assisted in bringing to light the existence of this immense amount of intangible property in the hands of the taxpayers which had been escaping taxation was the fact that *the 1917 General Assembly of Kentucky made intangible property the pet of tax legislation.* Under the amendment to Section 171 of our Constitution, the General Assembly was given the power to divide property into classes and to determine the class that should be subject to local taxation; and under this power intangible property was classified and exempted from all local taxation. This simply means that intangible property pays a tax of 50 cents upon each $100 of valuation to the State only. But the lawyer who owns a $1,000 library, who resides and practices his profession in the City of Louisville, Kentucky, is not only required to pay the State the 50 cents on each $100 valuation of his library; but likewise he pays 50 cents to his county; and $2.05 as a municipal tax to the City of Louisville.

Thus, the owner of intangible personal property in the City of Louisville in 1925 paid to the State of Kentucky 50 cents, whereas the lawyer paid on each $100 valuation of his library not only the 50 cents tax that the owner of intangible personal property paid, but in addition thereto 50 cents to the county, and $2.05 to the municipality, making a total of $3.05, or $2.55 more on each $100 valuation than is required of the owner of intangible personal property. In addition to this,

the lawyer is required to pay to his city a $25.00 professional tax.

This discriminatory burden that is laid upon the lawyer's library is also laid upon the humble cot, chair, baby buggy, cooking stove, coal shed, and all other tangible property that is owned by the humble laborer who pours the melted iron in making the products of the Standard Sanitary Manufacturing Company; while the holder of the stock, which some years pays as much as 25% in dividends, pays only to the Commonwealth of Kentucky 50 cents on the $100 in taxation upon this valuable dividend-paying stock, and nothing for the support of schools, the county or city government.

If the appellant in this case were actually forced to pay double taxation upon every dollar's worth of stock owned by him, he would then be paying for the support of his State, county and municipal government, $2.05 per hundred less on his valuable stock than is being contributed by the laborer in his factory on his tangible personal property.

We have tried in the foregoing statement to call things by their right name, conscious of the fact that "if things are called by their right name Caesar himself would be ashamed of fame." We are also conscious of the fact that under Section 174 of the present Constitution as originally adopted, to pay the tax on an honest assessment upon low dividend paying securities was practically equal to confiscation; but under that section as amended the owners of this type of securities receive more consideration and more par-

tiality—both from the Legislature and the Courts—than any other taxpayers in Kentucky.

The assault on the law as it now exists cannot be prompted by a desire for fair and impartial taxation, but with a hope of escaping all taxation for the support of State, county and municipal governments. And yet, we realize that if Section 4088, Kentucky Statutes, were in contravention of either the "due process" or the "equal protection" clauses of the 14th Amendment it would be the duty of this Honorable Court to nullify that section of our State Statute.

The appellant in his assignments of error designated six reasons why this Honorable Court should reverse the Kentucky Court of Appeals. In his 6th error he complains that Section 4088 of the Kentucky Statutes is in contravention to Sections 170, 171 and 172 of the present Constitution of Kentucky. That question was passed upon by the Court of Appeals, and its construction of the statute under those sections of our State Constitution was adverse to his contention and is binding upon him and this Honorable Court.

In the case of Caroline M. Forsythe v. City of Hammond, *et al.*, 166 U. S. 504, 41 L. Ed. 1095, this Honorable Court, in speaking through Mr. Justice Brewer, said:

> "The construction by the courts of a State of its Constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the Supreme Court of a State has misconstrued its Constitution or its statutes, but we are

not at liberty to therefore set aside its judgments. That Court is the final arbiter as to such questions. * * *."

With Error No. 6 thus eliminated under the foregoing ruling of this Court, we are confronted with five assignments of error which can be reduced to two:

First: The Tax Board of Jefferson County "intentionally, habitually and deliberately assessed appellant's stock at 100% of its value while intentionally, habitually and deliberately assessing other property at 70% of its fair cash value."

Second: That Section 4088 of the Kentucky Statutes is invalid under the 14th Amendment because it permits double taxation under the theory that the share of stock in the hands of the shareholder represents only an aliquot part of the property owned by the corporation, and since the corporation pays taxes upon twenty-five per cent of all of its property to the State of Kentucky, at least twenty-five per cent of the corporate property has been taxed twice when the full value of the share of stock is taxed.

We think that the foregoing is a fair statement of appellant's complaint under his assignments of error Nos. 1, 2, 3, 4 and 5.

So far as possible we shall use the same headings as used by the appellant in his brief.

## ARGUMENT.

### Alleged Discriminatory Assessment.

(1) Since appellant in his excellent brief first discusses the "intentional, habitual and deliberate" discrimination in the assessment of his stock as compared with other property in Jefferson County, we wish to call this Court's attention to the fact that he offers no testimony concerning the assessment of his stock for any year except 1925. Neither does his stipulation mention any other year. The testimony of Ben Marshall, Secretary of the Kentucky State Tax Commission, deals with taxation for the year 1925 and no other year, and the exhibit he files disclosing the valuation of real estate for taxation purposes as it relates to the sale value of real estate in Kentucky, based upon transfers of real estate made between July 1, 1923, and June 30, 1924, the assessment for 1925 being based upon a valuation of property in Kentucky fixed as of date July 1, 1924.

In the case of Keokuk and Hamilton Bridge Co. v. Fred Salm, Jr., *et al.*, 258 U. S. 122, 66 L. Ed. 496, Mr. Justice Brandeis, in speaking for this Court, said:

> "Since the appellant asserts a claim arising under the Federal Constitution, the district court had jurisdiction although there was no diversity of citizenship. Discrimination in taxation, effected by systematic inequality of assessment, may violate the 14th Amendment. Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 502, 61 L. Ed.

1280, 1283, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E 88. * * *."

In the Greene case above mentioned by Mr. Justice Brandeis, this Court, after referring to the case of Cummins v. Merchants National Bank, 101 U. S. 153, 25 L. Ed. 903, said:

> "* * * This Court held (page 157) that 'when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the State Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power;' and that this being the case made by the bill and being supported by the evidence, while the statute could not be declared unconstitutional, the discriminatory rule must be held void and the injustice produced under it remedied so far as the judicial power could give remedy."

A single valuation or a single assessment that is discriminatory would not disclose a rule or system of valuation.

Again, we think that before this rule could be applied in the instant case it would be necessary for the appellant by evidence to disclose to our Court of Appeals and to this Honorable Court a discrimination in assessment and valuation of and against appellant's stock and in favor of other property in that class. Real

estate does not belong to the same class of property as intangible personal property. The valuation of real estate was the only property appellant undertook to compare with the valuation of his stock. Real estate is placed in a class by itself. It is subject to State taxation, county taxation, municipal taxation, school taxation and to district taxation, while intangible personal property constitutes a separate, distinct class of property for purposes of taxation and is subject to State taxation only. In order to make a case of discrimination in assessment, appellant would have to show a systematic over-valuation of his stock with a systematic under-valuation of some other stock or some other type of security which is included in the class of intangible property in which his stock is assessed and taxed.

In the case of Samuel B. Raymond, County Treasurer of Cook Co., Ill., etc., v. The Chicago Union Traction Co., 207 U. S. 19, 52 L. Ed., 78, this Honorable Court, in speaking through Mr. Justice Peckham, said:

> "* * * it is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the State, through the board. There is here no contention of illegality simply

> because of assessing the franchises of these corporations at a different rate from tangible property in the State, *which the State might do.* (Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 599, 49 L. Ed. 615, 25 Sup. Ct. Rep. 342), but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. * * *."

We think that 6th Ruling Case Law, p. 375, Section 370, very succinctly states the rule applicable in cases similar to the instant case, as follows:

> "* * * The mere fact that legislation is based on a classification and is made to apply to certain persons, and not to others, does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions. Legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the prohibition of the 14th Amendment. While it is necessary that the law affect alike all persons in the same class and under similar conditions, so long as a law operates alike on all persons and property similarly situated, it is not subject to the objections of special or class legislation, nor is it in violation of the federal guarantee as to equal protection of the laws. While classification is proper, there must always be uniformity within the class. If persons under the same circumstances

> and conditions are treated differently, there is arbitrary discrimination and not classification."

Appellant does not undertake to show that any other person or corporation who owned stock or other intangibles subject to 1925 taxation in the same class to which the stock of the Standard Sanitary Manufacturing Company belonged, which was treated by under-valuation differently or more favorably in its assessment than was the stock of appellant, and unless such a disclosure is made in appellant's stipulation which is accepted as evidence, or in the testimony of Ben Marshall, he fails to establish his case of discriminating assessment and in this the burden is upon him.

This rule is made clear in the case of Corporation Commission of the State of Oklahoma, etc., v. William Lowe, etc., —— U. S. ——, 74 L. Ed. ——, 50 Sup. Ct. Rep. 397, in which Mr. Chief Justice Hughes, in speaking for this Court, said:

> "It was incumbent upon the appellee in invoking the protection of the 14th Amendment to show with convincing clarity that the law of the State created against him the discrimination of which he complained. An infraction of the constitutional provision is not to be assumed. On the contrary, it is to be presumed that the State in enforcing its local policies will conform its requirements to the Federal guaranties. Doubts on this point are to be resolved in favor of, and not against, the State. * * *."

## A.

### EQUALIZATION.

On page 14 of appellant's brief he states:

> "Confessedly appellant's stock was assessed at 100%—appellant claims at very much more—while real estate in Jefferson County was assessed at 69.9%, and real estate in all the counties in Kentucky on an average of 65 or 70%, so that appellant was denied the equal protection of the laws to the extent of 30%, or more.
>
> "The figures just given are sustained by the testimony of Ben Marshall, secretary of the State Tax Commission (R. 29), and the case is brought within the principle of Louisville & Interurban R. Co. v. Greene, 244 U. S. 499."

The error made by appellant in the foregoing statement is his assumption that the case at bar is within the purview of the principles enunciated in the case of Louisville & Interurban R. Co. v. Greene, *supra*. An examination of this case will disclose the fact that the Louisville & Interurban R. Co. enjoined the members of the State Board of Valuation and Assessment from placing into operation an assessment made upon its franchise for the year 1915, under Section 4077, Kentucky Statutes, and succeeding sections of the State statutes upon the grounds of discrimination in fixing its valuation. This assessment was made, of course, under Section 171 of our present Constitution, before the amendment thereto was submitted to the people by

the Legislature for ratification at the November, 1915, regular election. At that time Section 171 of the Constitution of Kentucky required that "taxes shall be levied and collected for public purposes only. They shall be *uniform upon all property subject to taxation* and within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws." Under the foregoing section of the State Constitution and statutes, the Louisville & Interurban R. Co. alleged that the State Board of Valuation and Assessment was discriminating against it, in that said Board had fixed the value of said franchise at 75% of its market value, while other taxable property in general was assessed "systematically, habitually and intentionally" at not more than 52% of its actual value, and that this systematic, habitual and intentional method of assessing the value of the railroad and the value of other property generally in the State was a violation of the equal protection and due process clauses of the 14th Amendment to the Federal Constitution. This petition set forth the above mentioned sections of our State Constitution and statutes that were in force at that time which required equal treatment of all property in Kentucky in matters of assessment and taxation. The petition disclosed under those laws an unquestioned discrimination in fixing the values of railroad property as compared with the valuation fixed on other property in the State for the purpose of taxation.

Under the Constitution and the statutes of Kentucky at that time, taxing authorities were prohibited

from classifying property or making any discrimination in favor of any class of property in the State of Kentucky.

In discussing this proposition of the discrimination in the Greene case, Mr. Justice Pitney, in speaking for this Court, said:

> "Is discriminatory taxation, contravening the express requirements of the State Constitution, beyond redress in the courts of the United States, their jurisdiction being properly invoked, when the discrimination results from divergent action by different assessing boards whose assessments are not subject to any process of equalization established by the State, and where the diverse results are the outcome, not, indeed, of any express agreement among the officials concerned, but of intentional, systematic, and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that in effect the two bodies act in concert? In our opinion, the answer must be in the negative."

The only similarity between the case at bar and the case of Greene v. Louisville & Interurban R. Co., *supra*, is the fact that in 1915 the Board of Valuation and Assessment not only fixed the valuation of railroad franchises in Kentucky but equalized those railroad franchises with each other; while real estate and other property was assessed by the county tax assessor and their values equalized by the county board of tax supervisors in each county, whereas at the present time intangible personal property is equalized by the State

Tax Commission of Kentucky and real estate is assessed by a county tax commissioner and equalized by the board of tax supervisors of the county.

Under the Constitution and statutes of Kentucky as they existed in 1915, taxing authorities in Kentucky were required to give equality or uniformity of treatment as to levy and assessment to all property in the State of Kentucky, and under that Constitution and statutes, as they then existed, this Honorable Court said that when the State Board of Valuation and Assessment, presumably knowing that the assessor and board of tax supervisors of the counties were habitually and systematically fixing the land at 52% of its actual value, and the Board of Assessment and Valuation was at the same time fixing the value of railroad franchises at 75% of their actual value, the resulting discrimination by the action of the State board and the county boards against the property of the railroad constituted a violation of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution.

Under the Constitution and statutes of Kentucky, as they existed in 1915, railroad franchises were subject to the same levy for State taxation to which all other property in Kentucky was subject. It was also subject to a levy for county, municipal, school and district taxation, and under each of these levying authorities the railroad was required to pay 23% more tax under this valuation than was required to be paid on other property under the same levy.

Under the Constitution and statutes of Kentucky, as they existed in 1925 and exist today, uniformity has been abolished, classification authorized and intangible personal property has been placed in a class by itself and is now made subject to State taxation only; whereas real estate is not only taxed for State purposes but is also taxed for county, municipal, school and other taxing district purposes. So, instead of intangible personal property being discriminated against by the treatment that is given to it by the taxing authorities of Kentucky, the discrimination is against tangible property which is required to pay more than twice the amount of tax paid on intangible property.

The taxing law, which this Court construed in the Greene case, and which was in force in Kentucky in 1915 was different from the law in force in Kentucky in 1925 and now. Necessarily the construction placed upon the taxing law in Kentucky in the case of Greene v. Louisville & Interurban R. Co., *supra,* can have no application whatever to the law of Kentucky as it existed in 1925 and as it exists now.

Again on page 14 of appellant's brief, he states:

> "The Kentucky Court (R. 62) says:
>
> " 'Appellant cannot complain that land in Jefferson County is equalized at 70%; for land is equalized in each county by the county board because land values depend on local conditions; but intangible property is equalized by the State board and is uniform throughout the State.'
>
> "Just how this statement answers our claim that we were not given equalization we cannot see.

> If land in Jefferson County was equalized by the county board, and upon local conditions, why were we not entitled to equalization when our land was assessed at 100%, and other land in that county assessed at 69.9%? It matters not, therefore, whether the ratio between assessed and real value be taken in Jefferson County alone or taken in the whole State, for in either case we have been denied equalization."

The foregoing statement in appellant's brief is unfair in that it is made to a Court which is not familiar with the taxing laws of Kentucky and the procedure thereunder.

(a) When appellant quotes from the opinion of Judge Hobson in Klein, *et al.*, v. Jefferson Co. Board of Tax Supervisors, *et al.*, 230 Ky. 182, 18 S. W. (2d) 1009, and then remarks, "Just how this statement answers our claim that we were not given equalization we cannot see," he is certainly overlooking a very cogent, lucid and unanswerable explanation of this identical point previously made in that opinion, which we will here quote for the convenience of this Court:

> "(2, 3) Appellant complains that his property is assessed at $95 a share when land in Jefferson County is only assessed at about 70 per cent of the average sale value, in voluntary sales. In the classification of property land is placed in one class, corporate stock in another. They are taxed at different rates. Appellant cannot at least complain that property in a different class from his property is assessed too low, unless the inequality

is gross, or such as to show an unreasonable discrimination. This is not shown. The proof shows that the purchaser of land is generally a person who wants that property, and is willing to pay more for it than one who does not need it. Private sales are usually made on credit, and people will pay more for property on credit than for cash. The board of tax supervisors, sitting in Louisville and acquainted with local conditions, judged that 70 per cent of the sale values represented about fairly the cash value of real estate. Some weight must be given to their judgment, for after all this is a matter of judgment. On the other hand, appellant's stock is valued according to the price it was bringing day by day on the stock market. He does not deny that his stock was selling at $95 a share day by day. There is no better way of fixing the actual cash value of a thing than the average of such daily sales for cash. The Constitution of the State requires that all property shall be assessed at its fair cash value, at voluntary sale. The Court is unable to see, therefore, that appellant is entitled to any relief under the Constitution of Kentucky."

(b) Again, when he remarks in this excerpt, "If land in Jefferson County was equalized by the county board, and upon local conditions, why were we not entitled to equalization when *our land was assessed at 100%*, and *other land in that county assessed at 69.9%*," we must express our surprise at this *declaration, for the simple reason that the assessing authorities of Kentucky in the instant case were dealing with*

*the market value of stock only and did not have under consideration the land values belonging to appellant or any other person or corporation in Jefferson County, Kentucky.*

If the appellant was assessed at 100% of the value of his real property in Jefferson County for 1925 when other real estate in that county was assessed at 69.9%, a complaint on this point should have been raised before the Board of Tax Supervisors of Jefferson County and if denied relief then said complaint should have been raised before the Jefferson Quarterly Court, the Jefferson Circuit Court, and the Court of Appeals of Kentucky. No such complaint is disclosed in the record of this case.

Upon the other hand, if by this excerpt the appellant is undertaking to state that the Standard Sanitary Manufacturing Company owned real estate in Jefferson County, and its real estate for 1925 was assessed at 100% of its actual value, when in fact other land in Jefferson County was assessed at only 69.9%, then this is a complaint that should have been made by the Standard Sanitary Manufacturing Company, as a corporation, in its own behalf, before the Board of Tax Supervisors of Jefferson County, and not by appellant, and certainly has no place in this case.

While the appellant in the beginning of this case undertook not only to act on his own behalf, but on the behalf of all other owners of stock in the Standard Sanitary Manufacturing Company who resided in Jefferson County before this case was acted upon by our

Appellate Court, his right to voluntarily act for others who owned stock in this corporation was brought before the Court of Appeals of Kentucky in the case of Cossar, Sheriff, v. Klein, 227 Ky. 768, 14 S. W. (2d) 160, in which our Court of Appeals, in discussing this identical question, and in construing Section 4128, Ken tucky Statutes, speaking through Chief Justice Clay, said:

> "(1) The first question to be determined is the right of Klein to maintain an action on behalf of the other stockholders. Section 4128, Kentucky Statutes, provides that any taxpayer feeling himself aggrieved by the action of said board of supervisors may appeal to the quarterly court within 30 days *after the final* adjournment of the said board, by filing with the judge of said Court a certified copy under the hand of the clerk of said board of the action taken. It further provides that 'he shall have the right to appeal from the decision of the quarterly Court to the Circuit Court and then to the Court of Appeals in the same manner that the law now allows appeals in civil cases.' The procedure is purely statutory, affording a remedy for an aggrieved taxpayer, if he thinks his property is not liable to assessment, or that an excessive valuation has been placed upon it. ***There is nothing in the statute which authorizes one taxpayer to act for another or others,*** and, in the absence of such provision in the statute itself, no such right exists. The statute confines the remedy to the aggrieved taxpayer, and he may not assume to act for others. * * *."
>
> **Cossar, Sheriff, v. Klein, 227 Ky. 768, 14 S. W. (2d) 160.**

The opinion construing Section 4128, Kentucky Statutes, was handed down by the Court of Appeals on December 21, 1928, and a rehearing denied March 29, 1929. It is binding not only upon appellant but on this Court. Forsythe v. City of Hammond, *supra.*

While the opinion of the Court of Appeals in the instant case was handed down June 21, 1929, and as appellant was a party in each of these case, we can conceive of no excuse for the declaration, "If land in Jefferson County was equalized by the county board, and upon local conditions, why were we not entitled to equalization when our land was assessed at 100% and other land in that county assessed at 69.9%," if he meant by that declaration that real estate of the Standard Sanitary Manufacturing Company was assessed at 100% of its real value, first, because he had no right to act before either Tax Board or the Courts in tax appeals concerning assessments of the property of a corporation, and second, because the assessment of real estate is a matter not involved in this controversy.

Continuing, on page 15 of this brief, the appellant states:

> "The State Court does not, of course, controvert our claim that the assessment of real estate, both in Jefferson County and in the State of Kentucky, was systematically, habitually and intentionally assessed at 69.9% in Jefferson County, and 65 or 70% in the State, and indeed the testimony of Ben Marshall, of the State Tax Commission, implies such habitual, systematic and in-

tentional assessment of real estate at the depressed values aforesaid."

We most emphatically deny that the testimony of Ben Marshall, of the State Tax Commission of Kentucky, directly or indirectly implies that land in Jefferson County was "systematically, habitually and intentionally" assessed at 69.9% of its real value or that land throughout the State was habitually, systematically or intentionally assessed at 65 or 70% of its real value.

For this Court's convenience we will quote questions 6, 7 and 8, with their answers, of Ben Marshall's deposition offered by appellant and appearing on page 30 of the record herein, as follows:

"Q. 6. Will you examine that list which you have just filed, and state generally what the relation is of the sale value of the lands with respect to the assessed valuation of the lands in the counties of Kentucky as a whole, and especially with respect to the county of Jefferson of the State of Kentucky.

"(fol. 59) A. Without making an actual calculation, it is my opinion that the transfers made by the clerks of the date mentioned for the one hundred and twenty counties of the State, that the assessed value will average between 65 and 70 per cent of the sale value of the property transferred.

"Q. 7. Will you examine this record, copy of which you have filed, and give me this information with respect to the sale values of lands in Jefferson County as compared with the assessed

valuations of lands in Jefferson County, Kentucky?

"A. Having examined the record it disclosed that the assessed value was 69.9 per cent of the sale value in Jefferson County.

"Q. 8. I will ask you, Mr. Marshall, whether or not in making this estimate you have just given, you took into consideration the fact that the United States revenue stamps were required to be attached to all deeds made prior to July 1, 1924, for some years last past before said date.

"A. In making the calculation to ascertain the percentage of the assessed value as compared to the sale value it was necessary in 90 per cent of the cases to use the revenue stamps as the basis of the real consideration in the transfer."

Under the tax laws of Kentucky, the State Tax Commission, in order to equalize the value of all property in any county with the value of all property in other counties, has the right to lower or raise the blanket value of any class of property in any county, and as an element of evidence of the true value of real estate in any county for the State Tax Commission to act upon, the law requires that the county court clerk shall report to the State Tax Commission each year the transfer price of all real estate sold in any county during the year as disclosed by the deeds for real estate recorded in his office.

In many instances the consideration stated in the deed is "one dollar and other valuable considerations." Sometimes shrewd real estate men who pur-

chase real estate for the purpose of reselling same at a profit are known to insert a larger consideration in the face of the deed than they paid for the real estate. Hence the county court clerk estimated the true selling price of the real estate in the year 1924 for 1925 by the revenue stamps that were attached to the deeds. Thus, in dealing with this element of evidence, the State Tax Commission knew that it was inaccurate, and it further knew that the transfer price of real estate did not determine the true value of real estate. There is no open and free market for real estate in Kentucky, as there exists for the sale of stock and bonds. If a factory wishes to expand and build an addition to its plant, the man who owns real estate next to that factory knows that the factory, before it would build a unit disconnected from the home plant, would pay a fancy price, above the real value of the real estate adjoining its plant, and that he can demand and receive from that factory a "hold-up price" for that real estate. Most transfers of real estate in Kentucky are made because the purchaser of that real estate has a special reason for buying same, or because the owner of said real estate by reason of financial distress is forced to sell it, which enables the purchaser to practically fix his own price. Hence, it becomes necessary, in order to get the true value of the real estate, to have local boards in each county who know the conditions which exist in that county, not only to take the consideration named in the deed of the transfers of real estate which

are laid before them by the county court clerk, but all other information that they personally have or can obtain, and thus fix the true value of the real estate in each county. And those local boards have fixed the true value of real estate in each county at from 65 to 70% of the sale value that was disclosed by the revenue stamps placed on the deeds recorded in the county court clerk's office in the year 1924 for the year 1925. And the testimony of Ben Marshall discloses this fact and this fact only, and no other inference is justified. Likewise, his testimony was that the true value of real estate as determined by the Board of Tax Supervisors of Jefferson County was 69.9% of the sale value in that county.

The Assistant Attorney General of Kentucky who represented the Board of Tax Supervisors of Jefferson County only asked one question on cross-examination of Ben Marshall, and the answer to that question absolutely destroyed appellant's opportunity to win his case under the law of Kentucky. We will discuss that question later.

We now desire to direct the Court's attention to Question No. 1, and the answer thereto on re-direct examination (R. 31), which question and answer are as follows:

> "R. D. Q. 1. In the answer to the last preceding question, Mr. Marshall, you do not mean to state, do you, that the same taxing method with respect to the assessment of *real estate is used when it comes to the assessment of real estate is used when*

*it comes to the assessment of such shares of stock,* do you?

"A. In my opinion real estate is assessed for more than 80 per cent of its value. There being no market quotations, this Commission is at a loss to find 100 per cent valuation on real estate. The valuation on Monday night be one price and by Saturday of the same week it might be advanced or depreciated more than 25 per cent, for the reason that the real estate is only transferred to particular individuals who want that particular peice or estate for certain purposes, and it has a greater value to them than it does to the other 99 per cent of the people in the same vicinity. Intangible personal property is required to be listed at 100 per cent of its market value on the first day of July, and I believe in a great majority of cases, that which reaches the assessor's book is assessed at 100 per cent of its market value."

We wish to call your attention to the fact that Mr. Ben Marshall, who had had practically ten years experience upon the State Tax Commission of Kentucky, as Secretary, emphatically stated in this answer that there was no market quotation on real estate and that the Commission was at a loss to find 100% value on real estate, but that *he believed that real estate in Kentucky in 1925 was assessed for more than 80% of its real value.* In other words, the testimony of this witness is, not that real estate is valued in counties other than Jefferson County at from 65 to 70% of its real value and in Jefferson County at 69.9% of its real value, but that in the State as a

whole the real estate was assessed for more than 80% of its real value. Unfortunately, he does not state how much more that value is fixed above 80% of its true value. But if he had not meant that it was fixed at practically its true value, he would not have used the expression, "for more than 80%."

Thus is it disclosed that appellant is in error when he states that "The State Court does not, of course, controvert our claim that the assessment of real estate both in Jefferson County and in the State of Kentucky was systematically, habitually and intentionally assessed at 69.9% and 65 and 70% in the State."

It is perfectly fair to all parties concerned to state that upon the part of the board of tax supervisors of Jefferson County, the previous administration of the Attorney General's office prepared this case for the Court of Appeals. This statement is made not in criticism or by way of evasion, for we think the record is in splendid condition so far as the board of tax supervisors of Jefferson County is concerned, but when appellant used the expression, "The State Court does not, of course, controvert," we wish to state that the burden of proof was upon the appellant. The Court of Appeals reviewed the evidence and in its opinion held that the appellant failed to make out his case, and the reason, we think, that the Court of Appeals so held, is disclosed in the single question and answer on cross-examination of Ben Marshall, on page 31 of the record, which question and answer are as follows:

"X. Q. 1. Mr. Marshall, are all holders of stock in corporations of the character and in the situation of the Standard Sanitary Manufacturing Company and other corporation (fol. 60) so situated, assessed and taxed in the same manner and upon the same basis?

"A. They are, absolutely."

Here is this whole controversy in a nut shell:

The valuation of appellant's stock by the taxing authorities and the levy that was made upon his stock, was the same valuation, levy and treatment as was given to all other stock of the same kind similarly situated. It received the same treatment which all property received that belonged to the class in which said stock was classified by the Legislature of Kentucky.

(2) On page 13 of his brief the appellant states:

"That inasmuch as the State cannot tax a foreign corporation's property outside of the State, and can only tax the percentage of its property which may be in the State, *it should not be possible to tax shares in the corporation held in the State, or, at most, tax them at a ratio in excess of the percentage by which the State could tax the corporation's property.*"

The Commonwealth of Kentucky is not attempting to and does not desire to tax property that is permanently located in any other state. The taxation of property permanently located outside of the boundary of Kentucky is not involved directly or indirectly in this case, but when appellant makes the declaration in his brief in the discussion of the taxation of shares

of stock in the hands of the shareholders issued by a foreign corporation that "it should not be possible to tax shares in the corporation held in the state, or, at most, tax them at a ratio in excess of the percentage by which the State could tax the corporation's property," we wish to challenge this statement, for the simple reason that a share of stock of a corporation in the hands of a shareholder, provided the corporation is a going concern, possesses elements of value that are not embraced by the physical assets of the corporation. The share of stock represents the value of the earning capacity of the corporation that is produced by its contracts for sale of the products of the corporation or the service that it is rendering. Sometimes the value of the shares of stock are enhanced by the business manager who controls and directs the operations of the corporation. Time and again Mr. Harriman took charge of railroads that were defunct in a commercial sense and, by his good judgment in controlling the activities of the corporation, would in a short time cause stock in that railroad corporation, which previously went begging for a buyer, to sell above par and the commercial world was eager to secure possession of this stock. Sometimes the corporation has a monopoly of a service in a particular community or of a product that is to be sold and this monopoly within itself causes the share of stock to possess a value that is far in excess of the value of physical tangible property.

When appellant undertakes to restrict the power of the State of Kentucky and prohibit it from taxing a share of stock beyond the value of the interest in the physical property that is owned by the corporation and represented by the stock and is listed for taxation by the corporation in Kentucky it is depriving the State of the power to tax several of the greatest elements of value that enters into the market price of stock, because he is prohibiting it from taxing the value of the earning capacity, good will, and other elements of value in that share of stock. To limit the power of the State to the taxation of the physical property of the corporation would limit the State to the taxation of junk value only, because all property owned by the corporation is secondhand property and naturally, if sold separate and apart from the going value of the corporation, would bring only junk prices.

The distinction between the value of the physical assets of a corporation and the value of a share of stock in the hands of the shareholder of that corporation was before this Honorable Court in the case of Howley v. Malden, 232 U. S. 1, 58 L. Ed. 477, and Mr. Justice Hughes, in speaking for this Court, said:

> "* * * Shares fall within a different category. While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or *choses in action*. Morawetz Priv. Corp. Section 225. As such, in the absence of legislation prescribing a different rule, they are

> appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. * * *"

To illustrate the principle involved, John Smith, of Kentucky, lends to William Jones, of Tennessee, $1,000 and Jones executes a negotiable promissory note to Smith for this loan and invests the proceeds in a farm in the State of Tennessee. Under the theory of the appellant we would have no right to tax the note in the hands of Smith, because the proceeds for which said note was executed is invested in a farm that is taxed by the State of Tennessee. But that note is a chose in action that possesses value to the amount of $1,000 in the State of Kentucky. It is property of that value and the State of Kentucky has a right to tax it. It is true that the note is merely the evidence of the debt. If it were lost or destroyed without the fault of the owner, the debt could be recovered from the maker thereof.

So it is with the share of stock in the hands of a shareholder. It is an obligation of the corporation to that particular shareholder that has the nature of a chose in action.

This point was before the Supreme Judicial Court of Massachusetts in the recent case of Hood Rubber Co. v. Commonwealth of Massachusetts, 238 Mass. 373, 131 N. E. 203, in which Chief Justice Rugg, speaking for that Court, said:

"The issuance of a certificate is merely giving evidence of a property interest in the corporation in the 'nature of contract rights or choses in action.' Hawley v. Malden, 232 U. S. 1, 9, 12, 34 Sup. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916 C 842; Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51, 57, 109 N. E. 891, Ann. Cas. 1916 C 834. *That property interest exists and may be enforced even though no certificate of stock be issued.* Old Dominion Mining & Smelting Co. v. Bigelow, 203 Mass. 159, and cases collected at 198, 89 N. E. 193, 40 Law Rep. Ann. (N. S.) 314."

The doctrine set forth by this Honorable Court, through Mr. Justice Swayne in the case of Farrington v. State of Tennessee, 95 U. S. 679, 24 L. Ed. 558, has never been repudiated by it, and therein it is stated:

"* * * The capital stock and the shares may both be taxed, and it is not double taxation. The bank may be required to pay the tax out of its corporate funds, or be authorized to deduct the amount paid for each stockholder out of his dividends. * * *"

As late as January 21, 1916, this point was before this Honorable Court in the case of Rogers, *et al*, v. County of Hennepin, *et al.*, 240 U. S. 183, 60 L. Ed. 594, in which Mr. Justice Hughes, in speaking for this Court, said:

"* * * It is also apparent that there is no merit in the objection that there was a violation of the federal constitution through what is called double taxation. The membership (referring to

a seat upon a stock exchange), as property, was distinct from the assets of the corporation. * * * *"

The fundamental error of appellant in his suggestion in No. 2 is in forgetting that the share of stock in the hands of the shareholder is a contract right in the nature of a chose in action which has been executed by the corporation to the shareholder, and it is this contractual right or chose in action that the State of Kentucky is taxing and not the physical assets of the corporation. It is true that the corporation may have taken the proceeds that it received for this share of stock and invested it in the physical assets of the corporation, as Mr. Jones took the $1,000 borrowed from Mr. Smith and invested it in a farm in the State of Tennessee. These physical assets of the corporation strengthen its ability to carry out its contractual obligation evidenced by its share of stock. But a farm in the State of Tennessee is separate, distinct property from the note which Jones executed to Smith, and is a chose in action held by Smith in the State of Kentucky,—property of value that the State of Kentucky has a right to tax just the same as it has the right to tax the shares of stock in the hands of appellant.

(3) Again, on page 13 of his brief appellant states:

"In sympathy with the principle just mooted, this Court is now restricting the rule under which double or multiple taxation has been allowed. See

Farmers Loan & Trust Co., Executor of Taylor, v. Minnessota, 280 U. S. 204, (January 6, 1930)."

Mr. James M. Gray in his excellent work "Limitations of Taxing Power and Public Indebtedness," has undertaken in Section 1359 of that work, to define double taxation, as follows:

> "Double taxation is the taxation of property twice in the same levy; or, more precisely, the taxation of persons, in respect of the same property or privilege, twice in the same levy. * * * Usually where double taxation is complained of, it is in the shape of taxation of interests which are nominally different but which are claimed to be essentially the same."

If property is taxed twice in the same levy it necessarily must be taxed by the same taxing authority in producing double taxation as set forth in the above definition. It does not contemplate the taxation of the same property by two equal sovereigns, one of which has no tax jurisdiction of the property.

Volume 1, Cooley on Taxation, page 505, Section 240, 4th Edition, in discussing double taxation, stated:

> "While taxes are levied upon the individual, and not upon property, though the value of the property owned by him is the standard by which the extent of his liability is ascertained and measured, and, therefore, the imposition of a tax twice upon one person *for the same purpose* because of his ownership of a particular piece of property would be a double tax, which, in consequence of its inequality, would not be sustained, *yet when the*

> *same property represents distinct values belonging to different persons, be those persons natural or artificial, both persons may be lawfully taxed, and the amounts of their separate contributions would be fixed by values which the same property represented in the hands of each, respectively. And this would not be double taxation in the sense in which it is obnoxious to a constitutional provision requiring equality in taxation or prohibiting double taxation.* In short, taxation of two or more is not double where the subject on which the tax is imposed is held by different titles. * * *."

A corporation owns its physical assets and as such assets their value is subject to taxation against the corporation. The shareholder of that corporation owns the obligation of the corporation in the nature of a chose in action, which gives to the shareholder an interest under certain conditions and restrictions in the same physical assets plus other values, such as good-will, dividend earning power, the ability with which the corporate affairs are managed, the confidence reposed in the capacity and permanency of tenure of the officers, and all other indirect and intangible increments of value which enter into the estimate of the worth of stock and help fix the market value or selling price of the shares, as specifically set forth by this Honorable Court in the case of San Francisco National Bank v. Dodge, 197 U. S. 70, 25 Sup. Ct. Rep. 384, 49 L. ed. 669.

The declaration that this Honorable Court is now restricting the rule under which double or multiple

taxation has been allowed, citing Farmers Loan & Trust Co., etc., v. Minnesota, *supra*, suggests an element of truth, mixed with error, which is misleading. Any person who reads the opinion of this Court as delivered by Mr. Justice McReynolds, will gather the thought that this opinion was striking at the assumed right of a state to tax property not within its jurisdiction for purposes of taxation. It does not deal with the proposition of a state undertaking to tax property twice of which it has jurisdiction under the same levy, or of a state doubling the levy upon the same property, but this opinion deals with the principle of law that is involved when two separate, distinct sovereign states undertake to tax the same property or privilege and one of those states has no taxable jurisdiction of it.

Of like import is the case of Thomas A. Baldwin, *et al.*, v. State of Missouri, decided May 26, 1930, in which Mr. Justice McReynolds, speaking for this Court, reaffirmed the doctrine set forth in the case of Farmers Loan and Trust Co. v. Minnesota, *supra*.

(4) On page 14 of appellant's brief he makes this statement:

> "* * *. It is not within the power of the State to arbitrarily discriminate between corporations as to the taxation of their shareholders or their shares. Both corporation and shareholders are interested to the contrary—the shareholder because the price of his share is diminished, and the corporation because it cannot raise money in competition with his competitors in whose favor the discrimination is made. These considerations

are regarded by this Court as of great importance because so large a part of the country's wealth is invested in negotiable securities."

The error that enters into the foregoing excerpt from appellant's brief is the fact that he assumes that all shares of all corporations can be taxed *only in one class*. He forgets that domestic corporations that own and pay taxes on 75% of all of their tangible property to the State of Kentucky are entitled to a different consideration by the taxing authorities of the State than the shares of stock that are in foreign corporations which do not pay taxes upon any tangible property to the State of Kentucky or pay only on an inconsequential percentage of its tangible property to Kentucky.

The purpose of Section 4088 of the Kentucky Statutes is to divide corporate stock in two separate distinct classes and for two purposes: First, that all owners of stock in Kentucky may be required to pay tax to it for its support, either through the payment of tax upon 75% of the assets of the corporation or by paying upon the valuation of the stock. The second purpose is to avoid double taxation; and the reason that this section exempts the stock of a corporation that has already paid taxes to the State of Kentucky upon 75% of its tangible assets is because the Legislature desired to avoid double taxation. The State is not trying to avoid double taxation because of any inhibition or prohibition in the 14th Amend-

ment to the Federal Constitution, but because it desires to be fair to its taxpayers.

This Honorable Court has repeatedly affirmed the doctrine that when a state has jurisdiction of property and of the person that owns that property the 14th Amendment does not prohibit it from levying double taxation thereon.

The State of Kentucky as a public policy desires to encourage investment by corporations in Kentucky. In so far as it can legally do so, it is the public policy of the State to encourage that type of investment by making its tax laws as reasonable as possible to those corporations which utilize the raw products of Kentucky and furnish employment to the labor of the State.

Corporations are required to list all of their property that is subject to taxation which is within the State, but the General Assembly knew that the average property as a general thing was listed around 75% of its true value. And when a corporation has paid tax upon 75% of its assets it has paid about as much tax as the average person pays upon tangible assets, because as a whole nearly all tangible assets in the State are subject not only to state taxation but to county, municipal, school, and district taxation. It rigidly enforces the rule as to taxing corporate stock at 100% of its value. The reason for this is that intangible property is the pet of tax legislation and is subject only to a tax of 50c to the State, escaping

all taxation so far as county, municipal, school, and district taxation is concerned.

When any man understands the taxing system of Kentucky as a whole, he will discover that that system deals justice to each taxpayer.

B.

**TAXATION OF STOCK IN THE RATIO OF THE PROPERTY OF THE CORPORATION HELD IN THE STATE OF THE SHAREHOLDER'S DOMICILE TO THE ENTIRE PROPERTY OF THE CORPORATION HELD THERE AND ELSEWHERE.**

On page 16 of his brief appellant states:

> "The State of the shareholder's domicile taxes his shares on the assumption that every share represents an aliquot part of all the property of the corporation wherever situate. The assumption that the shares are themselves property, and property located within the State is the veriest and most mischievous fiction. This Court has lately said, in *Safe Deposit, &c., Co.* v. *Virginia,* 280 U. S. 83 (Nov. 25, 1929): * * *"

We again desire to call the Court's attention to appellant's allegation that the State taxes a share of stock on the theory that the stock represents only an aliquot part of the tangible property of the corporation wherever situated. This allegation is made for the specific purpose of causing this Court to assume that by taxing the share of stock of appellant the State of Kentucky is taxing property which belongs to the corporation and is located out of the State.

In taxing the share of stock, Kentucky is taxing the value of the obligation of the Standard Sanitary Manufacturing Company in the nature of a chose in action which it has executed to Mr. Klein. That obligation has a commercial value, and in the instant case, instead of that value being only the value of the aliquot part of the physical property of the corporation, it is a far greater value than that aliquot part. The book value of this stock is $39.11 per share (R. 39). This book value represents the aliquot part of the value of the assets of the corporation. But the average market value of the stock in December, 1924, was $117.00. The difference between $39.11 and $117.00, or $77.89, is the value of the stock above the aliquot part, based upon the assets of the corporation. It is true that property owned by this corporation gives it ability to perform its obligation and that property may be located in some state other than Kentucky. But the obligation has a taxing situs at the residence of appellant, the owner of the stock or obligation.

Appellant could with equal wisdom make the declaration that the assumption that a national bank note as property located in the State is the veriest and most mischievous fiction, and he could offer a metaphysical argument to justify this declaration that would be more reasonable than the argument that he has offered with relation to his stock, because the bank note is an obligation that is based upon another obligation which has been deposited with our national government. But the fact that that obligation de-

posited with the U. S. Treasury upon which that bank note has been issued, and is permanently located at Washington, D. C., does not destroy the value of the obligation of the bank to pay the holder of that bank note, and the obligation of the United States to back up the payment of that bank note, when found on the first day of July to be a part of the possessions of a citizen of Kentucky. The bank that issued the note may be a non-resident of Kentucky, and all of its assets may be located out of this State, but as long as the people have confidence in the integrity of the bank and the government of the United States to liquidate that bank note, the obligation it represents possesses a value that is taxable in Kentucky, and a declaration to the contrary would be as ridiculous as the declaration of the appellant that his certificate of stock possesses no value and that the only thing that is being taxed is an aliquot part of the physical property that is owned by his corporation.

We do not desire to make any comments upon the opinion quoted by appellant from the case of the Safety Deposit, &c., Co. v. Virginia, handed down by this Court November 25, 1929, because this Honorable Court, in its discussion in those excerpts of the fiction of *mobilia sequuntur personam,* was discussing only the situs of stock for the purpose of taxation, and did not consider or refer to the value of the stock or any element thereof, or to any principles of assessment as applied to stock in the hands of a shareholder dif-

ferentiated from the property that is owned by the corporation that issued the stock.

At the bottom of page 16 of appellant's brief, he states:

> "The State has no just right to tax the shares at a rate in excess of the ratio of property of the corporation within the state to all of its property in all of the states, if at all."

These repeated declarations of appellant only disclose that he is incapable of distinguishing between the value of an obligation of a person or a corporation and the property that is owned by that person and the corporation. We know of some people who, though they did not own a dollar or any property of any kind or character, yet could with their personality so impress the community that their promissory note would pass in any bank in that community. The heart and brain of American manhood has not ceased wholly to place a value on honor and integrity, independent of property.

Appellant mentions on page 17 of his brief the case of Bethlehem Motors Co. v. Flint, 256 U. S. 421, reversing 178 N. C. 399, 100 S. E. 693. He claims that there are features in this case suggestive of the principles involved in the case at bar. We fail to discover the analogy.

Under a statute of the State of North Carolina all persons and corporations are prohibited from selling automobiles unless either the person or corporation that manufactured the automobile or the agent of the

manufacturer first procures a license so to do. The license fee fixed by said statute upon the occupation of selling automobiles is $500.00. If this fee has been paid by the manufacturer, it does not have to be paid by the agent. However, there is a proviso in this law which states that if the manufacturer who produces the automobile, or his agent, files an affidavit disclosing that four-fifths of all the property owned by the person or corporation manufacturing the automobile is located within North Carolina and reported for taxation, or if four-fifths of all the assets of the corporation is invested in state or municipal bonds of North Carolina, the one manufacturing automobiles or his agent shall receive a refund of $400.00.

That was an effort by the Legislature of North Carolina to make two classes in the occupation of selling automobiles in a revenue measure, and it is not pretended that there is a natural difference between the two classes or a difference which arises out of the occupation of selling automobiles. Neither is the classification based upon a policy of occupational taxation; nor does it have a fair and substantial relation to the object of the legislation. It constitutes a plain discrimination in favor of resident manufactures of automobiles against non-resident manufacturers. It lays a burden upon commerce and usurps the functions of our Federal Congress in regulating commerce between the States. It clearly violates the equal protection clause of the 14th Amendment to the Federal Constitution in that the attempted classification re-

quires a man engaged in the occupation of selling automobiles that happen to be produced by a non-resident manufacturer to pay five times more than is required of one who, engaged in the same occupation, sells an automobile that is produced by a resident manufacturer of automobiles, and this classification has no relation to the object of the legislation, to-wit: the taxation of the occupation of selling automobiles. Upon the contrary, Section 4088 of the Kentucky Statutes, in controversy, is a part of our scheme of *ad valorem* taxation, and the classification that is made by the Kentucky Legislature is grounded upon a difference having a fair and substantial relation to the public purpose and policy of the legislation, to-wit:

(a) To cause all property to contribute revenue for the support of our State government.

(b) To avoid as far as possible double taxation in levying *ad valorem* taxes upon the tangible property of corporations and upon the shares of stock issued by said corporations held by stockholders, by a provision exempting from taxation the shares of stock of those corporations issuing the stock which have in that year paid taxes to Kentucky and its sub-taxing districts upon three-fourths of all their tangible property. The exemption is based upon the theory that the corporations own the title to and have the possession of their tangible property and have paid taxes to the state substantially equal to the taxes borne by property of equal value owned by natural persons, while the shareholders'

interest in the tangible property of the corporations, which have borne their share of the tax burden, is indirect, remote and contingent; and the exemption is therefore just.

(c) To encourage investment by its tax policy in those corporate industrial enterprises which will furnish a market for the raw products of Kentucky and employ its labor, by exempting the shareholder not only from taxation upon the value of his remote and possible interest in the tangible property of his corporation, but also from the other values embraced in his stock by reason of the fact that it was issued by a corporation which is a going concern, but which has borne a tax burden on its property substantially equal to the burden that is generally exacted of other property in the State.

**(b) Section 4088 is in Harmony with Principles Enunciated in Kidd v. Alabama, 188 U. S. 728.**

The justification for the Legislature and the taxing authorities of the State to thus look behind the net values of shares of stock and to take into consideration the fact that the property which gives vitality to the valuation of that stock has already borne a tax burden to the Commonwealth of Kentucky which is substantially equal to the tax burden which is borne by other property similarly situated, is set forth by this Court in the case of Kidd v. Ala., 188 U. S. 728, 47 L. Ed. 669, in which this Court met the contention in

a similar case that the State was denying equal protection of the laws to a complaining stockholder, and in speaking through Mr. Justice Holmes, said:

> "We see nothing to prevent a state from taxing stock in some domestic corporations and leaving stock in others untaxed, on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the State must tax the stock held within the state if it is to tax anything, *and we now are assuming the right to tax stock in foreign corporations to be conceded.* If it does tax that stock, it may take into account that the property and franchises of the corporation are untaxed, on the same ground that it might do the same thing with a domestic corporation. There is no rule that the State cannot look behind the present net value of different stocks. See American Sugar Refining Co. v. La. 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43."

The principles enunciated in the foregoing excerpt have been referred to and ratified by this Court in the cases of Wright v. Louisville, etc., R. R. Co., 195 U. S. 219, 49 L. Ed. 167, 25 Sup. Ct. Rep. 16, Union, etc, Transit Co. v. Kentucky, 199 U. S. 205, 50 L. Ed. 154, 26 Sup. Ct. Rep. 36, Armour Packing Co. v. Lacy, 200 U. S. 235, 50 L. Ed. 457, 26 Sup. Ct. Rep. 232, Michigan, etc, R. R. Co. v. Powers, 201 U. S. 293, 50 L. Ed. 761, 26 Sup. Ct. Rep. 466, Liverpool, etc., Ins. Co. v.

Bd. of Assessors, 221 U. S. 356, L. R. A. 1915C, 903, 55 L. Ed. 768, 31 Sup. Ct. Rep. 550, Darnell v. Ind., 226 U. S. 398, 57 L. Ed. 272, 33 Sup. Ct. Rep. 120; Hawley v. City of Malden, 232 U. S. 10, 13, Ann. Cas. 1916C 842, 58 L. Ed. 482, 34 Sup. Ct. Rep. 201; Fidelity & C. Tr. Co. v. Louisville, 245 U. S. 58, 62 L. Ed. 148, L. R. A. 1918C 124, 38 Sup. Ct. 40; Cream of Wheat Co. v. Grand Forks Co., 253 U. S. 330, 64 L. Ed. 934. 40 Sup. Ct. Rep. 558; Watson v. State Comptroller, 254 U. S. 125, 65 L. Ed. 175, 41 Sup. Ct. Rep. 44; Citizens Nat. Bank v. Durr, 257 U. S. 109, 66 L. Ed. 154, 42 Sup. Ct. Rep. 15.

If the Legislature and taxing authorities of Kentucky cannot rely upon this long list of precedents repeatedly enunciated by this Court, we are wondering where the Legislature and taxing authorities of the states can look for a guide to point them to correct principles to be followed in the framing and in the application of state laws upon taxation.

After this Court had enunciated the rule that the legislature of the state had the right in fixing a classification for the taxation of shares of stock to look behind the net values of different shares of stock and if the corporation which issued that stock had paid to the state upon its tangible property and franchises a tax substantially equal to that tax other property had paid that that fact could be taken into consideration in determining exemptions and the different rates to be placed upon shares of stock issued by corporations

that had not contributed their substantial proportion of tax to the state.

Various states incorporated these principles enunciated by this Court into the taxing laws of their state and made them an integral part of their taxing system. This fact is disclosed by the large number of decisions of state courts which have cited the case of Kidd v. Ala., *supra*, as a justification of tax laws which have been adopted by the legislatures of their respective states in the following cases:

Darnell v. State, 174 Ind. 155, 90 N. E. 773; State v. Nelson, 107 Minn. 324, 119 N. W. 1060; State v. Tennessee, etc., Ry. Co., 188 Ala. 522, 66 So. 180; The State v. Ala. Fuel & Iron Co., 188 Ala. 511, 66 South 176; Georgia R. R., etc., Co. v. Wright, 124 Ga. 609, 53 S. E. 257; Commonwealth v. Union, etc., Transit Co., 118 Ky. 142, 80 S. W. 493; Bellows Falls Power Co. v. Commonwealth, 222 Mass. 62, 64, Ann. Cas. 1916C 834, 109 N. E. 897; Bliss v. Bliss, 221 Mass. 211, L. R. A. 1916A 889, 109 N. E. 152; State v. Parker Distilling Co., 236 Mo. 291, 139 S. W. 474; People v. Reardon, 184 N. Y. 451, 112 Am. St. Rep. 641, 77 N. E. 976; I. M. Darnell & Son v City of Memphis, 116 Tenn. 438, 95 S. W. 819; Chicago, etc., R. Co. v. State, 128 Wis. 644, 108 N. W. 581; Kingsley v. Merrill, 122 Wis. 201, 67 L. R. A. 200, 99 N. W. 1049; Denver v. Hobbs Estate, 58 Colo. 228, 144 Pac. 877; City of Trenton v. Standard Fire Ins. Co., 76 N. J. L. 81, 68 Atl. 1112; Birmingham v. O'Connell, 195 Ala. 63, 70 So. 185; State, *ex rel.*, Atty. Gen. v. Bodcaw Lumber Co., 128 Ark. 511, 194

S. W. 694; First Nat. Bank v. Moon, 102 Kan. 350, L. R. A. 1918C, 986, 170 Pac. 40; Bellows Falls Power Co. v. Commonwealth, 222 Mass. 62, 64, Ann. Cas. 1916C, 834, 109 N. E. 897; State, *ex rel.*, Fargo v. Wetz, 40 N. D. 313, 5 A. L. R. 731, 168 N. W. 840; State, *ex rel.*, Langer v. Packard, 40 N. D. 198, 168 N. W. 676; Commonwealth v. Semet-Solway Co., 262 Pa. 237, 105 Atl. 93; Sayles v. Foley, 38 R. I. 491, 96 Atl. 344, 12 N. C. C. A. 949; Northwestern Mut. Life Ins. Co. v. State, 163 Wis. 493, 155 N. W. 612; Detroit v. Kresge, 200 Mich. 684, 167 N. W. 44; O'Neil v. Providence Amusement Co., 42 R. I. 534, 108 Atl. 908; besides the comment in the notes in 43 A. L. R. 687, under the heading of "Alabama."

We think it is remarkable that in the search we have made we found no opinion, State or Federal, which criticises Kidd v. Alabama.

Frankly, when we observe how the principles enunciated by this Court in Kidd v. Alabama, *supra*, have been embodied in the legislation of so large a number of the States of the American Union and the legislation upheld and justified by the principles therein enunciated by this Court by the repeated opinions of the respective Supreme Courts of the various States, as well as by this Court, we can see no reason why these principles should be overturned simply because the petted and pampered owners of intangible property desire to be freed from all obligation of contributing to the support of the State governments that give legal life, vitality, and protection to their property and who are

the first and the most exacting people in demanding from the State the protection of their property rights.

**(c) The Classification in Section 4088 is Justified by the Policies and Purposes of Permitted Legislation.**

There is no question but that the Kentucky Legislature in enacting Section 4088, Kentucky Statutes, had in mind the purpose and policy of encouraging investment in corporations which were utilizing the raw products and labor of Kentucky, and further there is no question but that a classification can be made in taxation that has as a basis that or a similar purpose and that the carrying out of such a purpose and policy is not a violation of either the due process or equal protection clause of the 14th Amendment.

In the case of the Southwestern Oil Company, Plaintiffs in Error, v. The State of Texas, 217 U. S. 112, 54 L. Ed. 688, this Honorable Court made a complete analysis of the powers of the State in classifying property for the purpose of taxation. The opinion was written by Mr. Justice Harlan—a soldier in the Union Army, in the War between the States, a lawyer of extraordinary learning, a man who was familiar with the history, the times and the motivating purposes which generated and promulgated the 14th Amendment—and in speaking for this Court, he said:

> "* * * We think that we are safe in saying, that the 14th Amendment was not intended to compel *the State to adopt an iron rule of equal taxation.* If that were its proper construction, it would

not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations *which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State in one form or another, deems it expedient to adopt.*"

In the foregoing excerpt this Court definitely states the legal right and power of the State under the 14th Amendment to so devise its system of taxation as to either encourage needed and useful industries or to strike at intemperance and vice. Of course the policy that would encourage useful and needed industry must be grounded in justice and the classification must not be arbitrary, but this Court having enunciated, in Kidd v. Alabama, *supra,* the right of the State to look behind the asset value of a share of stock and discover whether or not the corporation has contributed to the State taxes based upon the property that it owns in quantity that is substantially equal to that required of other persons and corporations and, when it discovers that ample contribution has been made, it can use that fact as a basis upon which to fix the exemption of the corporation's stock in the hands of the stockholder. The purpose and policy to bring a useful and needed industry in the State is alone sufficient as a basis for classification, but when linked to the principles of jus-

tice as enunciated in the case of Kidd v. Alabama, *supra,* there can be no question but that such legislation meets every requirement of the 14th Amendment.

This point was made clear in the case of Anna H. Watson, etc., v. State Comptroller of the State of New York, 254 U. S. 121, 65 L. Ed. 170, in which Mr. Justice Brandeis, in speaking for this Court, said:

> "* * * *Any classification is permissible which has a reasonable relation to some permitted end of governmental action.* It is not necessary, as the plaintiff-in-error seems to contend, that the basis of a classification must be deducible from the nature of things classified,—here the right to receive property by devolution. *It is enough, for instance, if the classification is reasonably founded in 'the purpose and policy of taxation.'* "

This decision was handed down in October, 1920. It clearly gives the State the right to base the classification that has a reasonable relation to any permitted end of government, and what greater or more useful "permitted end of government" could be promoted and encouraged by the Legislature of a State than the investment of capital in those industrial enterprises within the State which will utilize the raw products and the labor therein and bring thereto capital and prosperity for the people of the State.

In the very recent case of Louisville Gas & Electric Company v. Clell Coleman, 277 U. S. 32, 72 L. Ed. 770, this Court had before it the mortgage recording tax of the State of Kentucky and also an exemption in favor

of building and loan associations. While it held in that case that the mortgage tax was invalid because arbitrary, it upheld the exemption as to building and loan associations, and in discussing the reasons therefor, Mr. Justice Sutherland, in speaking for this Court, said:

> "The exemption of building and loan associations from the operation of the tax is a different matter. The equal protection clause of the 14th Amendment does not preclude a State in imposing taxes from making exemptions, provided the power is not exercised arbitrarily. It may exempt the property of churches, charitable institutions, and the like; and it does not admit of fair doubt that, under the circumstances disclosed by the opinion of the court below in the Middendorf case, it has lawfully exempted building and loan associations. That court points out that a building and loan association under the Kentucky Statutes must receive payments from members only and make loans to members only; in pursuance of a plan set forth. Money accumulated is to be loaned to members according to a rule of priority. The essential principle of such an association is mutuality. *The purpose of the statutes, the court below says, was to provide the members of the associations with the means of borrowing mo. for the acquisition of homes, in recognition of the duty of the State to encourage the acquisition of homes by its citizens.* SUCH ASSOCIATIONS ARE ALSO PLACED BY THE STATE STATUTE IN A SEPARATE CLASS FOR PURPOSES OF AD VALOREM TAXATION. It is made clear by the lower court that the purpose of

> the exemption was to enable these associations, by relieving them of a burden, more completely to carry out the *quasi* public purpose which the legislature designed in providing for their creation. This exemption, therefore, must be upheld; * * *"

Thus the ground of sustaining the exemption from the mortgage recording tax in favor of building and loan associations by Kentucky was none other than the *quasi* public purpose which the legislature designed in encouraging the acquisition of homes by its citizens.

In the recent case of Ohio Oil Co. v. Conway, Supervisor of Public Accounts of Louisiana, 74 L. Ed., p. 456, Advance Sheets, Mr. Chief Justice Hughes, in speaking for this Court, emphasized this point, as follows:

> "The States have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal system to insure revenue and foster their local interests."

Other decisions from this Court can be cited equally as strong as the foregoing, but these are so decisive in character and so recent in point of time that we deem it unnecessary to burden this brief with other citations upon this point.

**There is a Wide Difference Between the Taxation of a Share of Stock as the Property of the Owner and the Taxation of a Corporation upon its Capital Stock or Property—Different Property—Different Interests in Property—and Different Parties to be Taxed.**

On page 19 of appellant's brief, he states:

> "International Paper Company v. Massachusetts, 246 U. S. 133, expounds what is the most cogent in our favor. It reaffirms the principles of the Western Union Tel. Co. v. Kansas, and similar cases."

An examination of the foregoing case disclosed the fact that it is dealing with a license or privilege tax and not with an *ad valorem* tax, and that in fixing the amount of the license to be charged to a foreign corporation for entering the State or to continue to do business therein, Massachusetts used the number of shares of stock held by the foreign corporation for the purpose of measuring and determining the amount of the license tax to be charged against the corporation for the privilege of doing business. At that time Massachusetts had upon its statutes an Act that had been passed in 1909, which Act had been construed by this Court in the case of Baltic Mining Company, plaintiff-in-error, v. Commonwealth of Massachusetts, 231 U. S. 67, 58 L. Ed. 127, in which Mr. Justice Day, in speaking for this Court, sustained the validity of the original act as it had been interpreted by the Supreme Court of Massachusetts and, as interpreted, the orig-

inal act only undertook to tax the property and business of foreign corporations which were used and transacted in the State. Thereafter, the Legislature amended the 1909 statute in 1914, and the court of last resort in Massachusetts, in subsequently construing this statute of 1909, as amended by the 1914 Act, declared that under these two acts, Massachusetts had the right to levy a tax of 1/50 of 1% upon each share of capital stock up to $10,000,000, and upon each share above $10,000,000, a tax of 1/100 of 1% as a license tax against a foreign corporation for the privilege of entering or continuing to remain in Massachusetts for the purpose of transacting business therein; and the United States Supreme Court in the case above referred to in the above excerpt in appellant's brief held that the original Act of 1909, as amended by the Act of 1914, was then invalid by reason of the 1914 amendment, and Mr. Justice Van Devanter, in speaking for the Court in the case of International Paper Company v. Commonwealth of Massachusetts, 246 U. S. 133, 62 L. Ed. 624, said:

> "A license fee or excise of a given percentage of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposed is to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation including that which is interstate, and on its entire property, including that in other states; and this be-

cause the capital stock of the corporation represents all its business of every class and all its property, wherever located."

Thereafter, the Supreme Court of Massachusetts held that the Act of 1909 was an independent act, and that as the 1914 Act was invalid, it did not change or repeal the Act of 1909 and that it continued in full force and effect.

Subsequently, the Locomobile Company—a foreign corporation that had paid its tax under the 1909 and 1914 Acts—sued the Treasurer of Massachusetts for the return of the tax paid under the invalid tax act in the Federal District Court of Massachusetts. The State resisted the attempted recovery of the tax and plead that the tax was paid under the 1909 Act and that said act was not changed or repealed by the invalid act of 1914, citing the opinion of the Supreme Court of Massachusetts, rendered subsequent to the opinion of this Court in the case of the International Paper Co. v. Massachusetts, *supra,* in harmony with its plea. The District Court rendered judgment against the State. But this Court, on a writ of error, reversed the District Court and denied the recovery of the tax, in an opinion written by Mr. Justice Holmes in the case of Burrell v. Locomobile Co., 258 U. S. 34, 66 L. Ed. 450.

There is no question of the soundness of all three of these opinions, but neither of said opinions has any application to the case at bar.

In the instant case, Kentucky has not tried to levy either a license tax or an *ad valorem* tax against any

foreign corporation based either upon its capital stock or tangible property, but has taxed a share of stock that was issued by a foreign corporation and was owned by a resident of Kentucky, who is appellant herein. That share of stock is an obligation of the foreign corporation of the nature of a chose in action which was made by it to and is owned by the resident of Kentucky, and in his hands is property of value having a situs in this State, and is as subject to the *ad valorem* tax as any other chose in action in the hands of appellant or others.

We have recited the history of these three cases that we may clearly get before the Court that these cases, and all other cases mentioned by appellant in his brief from pages 19 to 26 inclusive, are cases upon which this Court has rendered opinions, but has in each instance dealt with a tax which was levied by a State against a corporation, and in nearly every instance either directly or indirectly taxed all of the capital stock of a foreign corporation or the tangible property of that corporation located both in and out of the State levying the tax. They do not deal with the problem in the instant case, to-wit: the right of a State to levy a tax upon a share of stock in a corporation which is owned by a resident of Kentucky. It seems to us that one of the fundamental errors of appellant's position is that he fails to recognize that the capital stock and tangible property which is owned by a corporation is the property of a person, which is not only separate and distinct from the person who owns a share of stock

of that corporation, but the share of stock in the possession of its owner is separate and distinct property from the corporate stock and tangible property of the corporation. And the distinctions here pointed out have been continuously recognized by this Court and repeatedly affirmed through a long list of cases, including Farrington v. State of Tennessee, *supra,* down to and including the case of Hawley v. Malden, *supra.*

The distinction here stated, we think, was clearly recognized and acknowledged in an opinion of this Court handed down by the great Chief Justice Marshall in the case of McCullough v. The State of Maryland, *et al.,* 4th Wheaton, 314, 4 L. Ed. 579. In this case this Court had before it the question whether or not the State of Maryland had a right to pass a law taxing banks created by the Congress of the United States, and, while this Court unanimously withheld that right, Chief Justice Marshall said:

> "This opinion does not deprive the State of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with other real property within the state, *nor to a tax imposed on the interest which the citizen of Maryland may hold in this institution in common with other property of the same description throughout the state.* But this is a tax on the operation of the bank, and is consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

In this opinion, while this Honorable Court is holding that a bank created by the Congress of the Federal Union for the purpose of carrying on its business, cannot be taxed by a State, yet when it said that that decision did not apply to "a tax imposed on the interests which the citizen of Maryland may hold in this institution" it was saying that Maryland had a right to tax the share of stock in the bank held by its citizen because his interest in the bank could be nothing else except that share of stock. And the reason therefor is the one which we have repeatedly stated in this brief, to-wit: that the share of stock was the obligation of the bank, in the nature of a chose in action, which was owned by the citizen and was property like similar obligations and subject to State taxation as the property of the appellant in the instant case, and it was neither the capital stock of the bank nor its property.

C.

UNSOUNDNESS OF DOUBLE OR MULTIPLE TAXATION.

On page 27 of his brief, the appellant states:

> "* * * but while shares are available, they are so because they represent property, and when the property is in another State, taxation of the shares is taxation of property outside the jurisdiction of the taxing State. *There is no escape from this conclusion.* But such taxation has always been an abuse, and has led courts and legislatures into inextricable inconsistencies. These have of late been recognized as injustices and enormities."

The italics above are those of appellant.

His contention that a taxation of the shares is a taxation of property outside the jurisdiction of the State, and "there is no escape from this conclusion," is in direct conflict with the recent opinion of this Court in the case of Rhode Island Hospital Trust Co. v. Doughton, Commissioner of Revenue of the State of North Carolina, 270 U. S. 68, 70 L. Ed. 475. In this case one George Briggs died October 29, 1919, testate, domiciled in the State of Rhode Island. He never resided in North Carolina. The Rhode Island Hospital Trust Company was appointed his executor and qualified as such before the Municipal Court of the City of Providence, R. I. Among other personal property passing to the executor under the will were shares of stock in the R. J. Reynolds Tobacco Company, which, with declared dividends unpaid, were valued at $115,634.50. The R. J. Reynolds Tobacco Company is a corporation, created under the laws of the State of New Jersey. It has an office in the State of North Carolina and two-thirds or more of all of its tangible property is located in the State. None of the shares of stock belonging to George Briggs were at the time of his death, or at any time while he owned them, in the State of North Carolina. However, the Commissioner of Revenue of the State of North Carolina assessed an inheritance tax upon a 66⅔% value of said shares of stock, amounting to $77,089.67, which produced a tax of $2,658.85, and the theory upon which this property was assessed and the tax levied against it was that the shareholder is

the owner of the property of the corporation and the State, which has jurisdiction of any of the corporate property, and had *pro tanto* jurisdiction of his shares of stock.

If the contention of the appellant in the foregoing excerpt is correct, North Carolina had a right to collect the inheritance tax in the above mentioned case from the estate of George Briggs, because two-thirds of all the property of that corporation was located in the State of North Carolina and within its jurisdiction and if the share of stock simply represented the physical property of the corporation, the State of North Carolina was justified in levying the tax. However, this Court, in speaking through Mr. Chief Justice Taft, in discussing this point, said:

> "* * * We cannot concur in this view. *The owner of the shares of stock in a company is not the owner of the corporation's property.* He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all of its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all of the debts of the corporation have been paid and the assets divided in accordance with the law of its creation. But he does not own the corporate property."

After citing and quoting from Van Allen v. Assessors (Churchill v. Utica, 3 Wall. 573, 583, 18 L. Ed. 229, 234), this Court further said in that case:

"The same principle is declared in Jellinik v. Huron Copper Min. Co., 177 U. S. 1, 44 L. Ed. 647, 20 Sup. Ct. Rep. 559, in which it was held that shares of stock in a corporation had a situs in the state creating the corporation so that they were there subject to *mesne* process. It is approved in Farrington v. Tennessee, 95 U. S. 679, 686, 24 L. Ed. 558, 560; in Hawley v. Malden, *supra,* at p. 12 (58 L. Ed. 482, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842); in Eisner v. Macomber, 252 U. S. 189, 208, 213, 214, 64 L. Ed. 521, 529, 531, 532, 9 A. L. R. 1570, 40 Sup. Ct. Rep. 189; and in Des Moines Nat. Bank v. Fairweather, 263 U. S. 103, 112, 68 L. Ed. 191, 44 Sup. Ct. Rep. 23; Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 68, 70 L. Ed. 475."

The foregoing pronouncement of this Court so accurately presents the contention of the Commonwealth of Kentucky, and the opinion is so recent, we deem it unnecessary to cite other authority or to make any comment upon this point.

Again on page 27 of appellant's brief, he says:

"It is especially in the imposition of multiple inheritance taxes that the absurdity has been most plainly exposed, but multiple taxation therein has been upheld upon the ground that inheritance taxes were excise taxes and not property taxes, and, consequently, not protected by the 14th Amendment. This doctrine was announced in Magoun v. Illinois Trust & Saving Bank, 170 U. S. 283; Blackstone v. Miller, 188 U. S. 189, and in Wheeler v. Sohmer, 233 U. S. 34; * * *."

When appellant in the above excerpt declares that the above mentioned cases upheld multiple taxation upon the ground that inheritance taxes were excise taxes, and consequently not protected by the 14th Amendment, he certainly ignored the plain declarations of this Court in at least one of these opinions, because Mr. Justice McKenna, in delivering the opinion of this Court in Magoun v. Illinois Trust & Savings Bank, *supra,* said:

> "* * * Our inquiry must be, not what will satisfy the provisions of the State Constitutions, but what will satisfy the rule of the Federal Constitution. The power of the states over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that Constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws. * * *
>
> "Is the act open to this criticism? The clause of the 14th Amendment especially evoked is that which prohibits a state denying to any citizen the equal protection of the laws. * * *"

Thus is disclosed in the very heart of this opinion that this Court, in the leading inheritance tax case, enunciated the principle that the privilege of the devising or inheritance of property *must be conferred or regulated by equal laws, under the requirements of the 14th Amendment.*

It is unnecessary to inform this Court that in Magoun v. Illinois Trust & Savings Bank, *supra,* which

is so often referred to as the leading case bearing upon the principles of inheritance law, that the many classifications set out, in the law therein construed, were sustained as being valid under the equal protection clause of the 14th Amendment. The due process of law clause of the 14th Amendment was not raised or decided by the Court in this case.

The case of Blackstone v. Miller, *supra,* brought before this Court the levying of an inheritance tax under the laws of New York upon a transfer by will of certain property of Timothy B. Blackstone, who died domiciled in Illinois, the property transferred being a debt of $10,692.24 due to the deceased by a firm in New York, and the net sum of $4,843,456.72 held on deposit account by the United States Trust Company of New York. The objections to the tax were seasonably made on the ground that all of this property had been taxed in Illinois and as intangible personal property its situs for taxation was in that State at the domicile of the decedent, under whose will the property was transferred and in the State where the will was being administered.

This Court, in speaking through Mr. Justice Holmes, in answering the contention that the New York statute was in contravention to the due process of law clause of the 14th Amendment, said:

> "* * * But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the

practical fact of its power over the person of the debtor. The principle has been recognized by this Court with regard to garnishments of a domestic debtor of an absent defendant. * * *

"* * * The fact that two states, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the rights which they respectively confer, gives no cause for complaint on constitutional grounds. * * *"

Now, it is true that Farmers Loan & Trust Co., Executor of Taylor, v. Minnesota, 280 U. S. 204, overruled the principles thus enunciated in the foregoing excerpts in Blackstone v. Miller, *supra*, but this Court never has overruled the principles that were enunciated in the case of Magoun v. Illinois Trust & Savings Bank. Because the evils of multiple taxation were mentioned in Farmers Loan & Trust Company v. Minnesota, *supra,* appellant seems to have reached the conclusion that the sole and principal proposition before this Court in that case was double taxation. The sole and principal proposition before the Court in that case, and which the Court decided, was that intangible personal property could have a situs for taxation in only one State and, when taxed in that State lawfully, it could not be taxed in any other State because no other State had a taxable jurisdiction thereof. Taxation of property of which the State had no jurisdiction was and is in contravention of the "due process of law" clause of the 14th Amendment. Mr. Justice Holmes advanced the theory in Blackstone v. Miller that, al-

though the situs of the property in that case was in Illinois, the fact that New York by its laws rendered a service by enabling the executor to collect from the debtor residing in New York, the debt, this service justified New York in taxing the transfer of the debt from a decedent resident in Illinois; but Farmers Loan & Trust Co. v. Minnesota invalidated this theory and held that the service of the law in enabling the executor to collect a debt from a debtor resident in New York did not give taxing jurisdiction of a transfer of a debt that occurred in Illinois. Now it is significant that while this Court overruled Blackstone v. Miller, it did not overrule Magoun v. Illinois Trust & Savings Bank. The latter case dealt with the problem of classification similar to the case at bar and held the classification justified under the "equal protection clause" of the 14th Amendment, and has never been overruled. We admit that that classification was upon a death transfer tax while the classification in the case at bar is upon a property tax, but the classification in both instances is valid under the 14th Amendment.

Again, on page 28 of his brief, appellant states:

> "The principle at the base of the decision in Farmers L. & T. Co., Ex'r of Taylor v. Minn., applies to taxation of shares at the shareholder's domicile at 100% when the property represented by the shares lies wholly or partly in other states. * * *"

Appellant continues to repeat his error that the share of stock in the hands of the shareholder is the

same property as the tangible property that belongs to corporations. He does not distinguish between the obligation in the nature of a chose in action, to-wit: a share of stock which it has sold, and the physical property of that corporation. He cannot understand that the physical property of the corporation constitutes its assets while a share of stock in the hands of a shareholder is a liability of the corporation, in that it is an obligation upon which it is morally and legally bound to earn and pay to its owner dividends.

Continuing on the same page of his brief, appellant states:

> "Inasmuch as inheritances cannot be taxed except in the state of the decedent's domicile when they consist of intangibles, or at the *locus in quo* when they consist of tangibles, because taxation belongs to the jurisdiction over the property in question—upon the same principle the shares of the shareholder in a corporation cannot *rightly* be taxed at all. * * *"

Appellant at last has given this Court the reason for this suit. He thinks it a crime for Kentucky to collect from him any tax. He honestly believes that Kentucky should exempt his property, but collect taxes from the other fellow to pay the cost of protecting his property. However, in his entangled sophistry he continues with his alleged reason:

> "* * *because to tax them amounts to taxation of property in another jurisdiction, or, at most, cannot properly be taxed in excess of the

ratio or *net* property in the state of the domicile to property situate there and elsewhere."

To illustrate his economic logic, Klein, a resident of Kentucky, owns a note of the face value of $1,000 against Smith, a resident of Tennessee, who is worth $100,000, with all of his property located in Tennessee except $100.00 in Kentucky. The taxing authorities in Kentucky in fixing a valuation of that note can only value it at the ratio that $100.00 of Smith's property in Kentucky bears to his property in Kentucky and elsewhere. Thus, the valuation of a note for $1,000 upon a solvent maker in the hands of Klein would be $0.10. This expresses the value of his patriotism and the full worth of his logic based upon a false premise. As appellant states farther on in this page of his brief, "taxation is something so practical." But if the State of Kentucky should follow the economic method of fixing the valuation of intangible property suggested in his brief, it would deprive Kentucky of any taxing income from more than $500,000,000 in valuation of stock, some of which, like appellant's, pays a dividend of 25%, and the tax thus eliminated would have to be laid upon tangible real and personal property which in the City of Louisville in 1925 bore a State, county, city and school tax of $2.85 on each one hundred dollars of valuation, while his stock only paid 50 cents per one hundred dollars of valuation. He successfully ignores his subject of "Unsoundness of Double or Multiple Taxation," but he makes a masterful plea for "No Taxation on My Property."

D.

**ASSUMING THE PROPRIETY OF TAXING SHARES AND ALSO TAXING THE PROPERTY OF THE CORPORATION, THE STATE OF THE SHAREHOLDER'S DOMICILE HAS NO RIGHT TO ARBITRARILY DISCRIMINATE BETWEEN CORPORATIONS AND ARBITRARILY SELECT THOSE WHOSE STOCKHOLDERS ARE TO BE TAXED AND OMIT TO TAX THE STOCKHOLDERS OF THE OTHERS.**

On page 29 of his brief, appellant states:

> "If we assume, for argument's sake, that the shareholder may still be assessed at 100% regardless of what property, if any, of the corporation may be located within the State of domicile, *it is not within the power of the State to arbitrarily discriminate between corporations in the taxation of their shareholders.* * * *"

We are afraid that appellant has forgotten that the Commonwealth of Kentucky can exercise a few of the attributes of a sovereign within the purview of the 14th Amendment as now construed by the courts. Instead of offering any reason of our own as to the unsoundness of the undescored pronouncement of appellant in the above excerpt, we will place by its side the authoritative announcement of this Court passing upon the powers of a State under the Federal Constitution, as promulgated in the case of Merchant's and Manufacturer's Bank v. Pennsylvania, 167 U. S. 461, 463, 42 L. Ed. 236, wherein this Court upheld a Pennsylvania statute which was attacked on the ground that

the classification was arbitrary, and in speaking for the Court Mr. Justice Brewer said:

> "If it be said that a lack of uniformity renders the statute obnoxious to that part of the 14th Amendment to the Federal Constitution which forbids a state to 'deny to any person within its jurisdiction the equal protection of the laws,' it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all bank shares, whether state or national, rests the ordinary state tax of 4 mills. To every bank, state and national, and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying 8 mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value naturally it elects to collect and pay the 8 mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without surplus, and whose stock is only worth par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose, for any fair reason affecting only its internal affairs, the state

should see fit to wholly exempt certain named corporation from all taxation. *Of course the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution.*"

We should remember that iron-clad, theoretical laws that apply the same tax to every species of property and to every interest in property, regardless of the fact that the interest is remote and contingent, will ofttimes in practice destroy actual uniformity and equality. Taxation is intensely practical, and the pole star that should guide the Legislature in distributing its burdens of taxation is equal justice to the taxpayers, based as nearly as possible upon the earning capacity of his property taxed.

In discussing the practical design of taxing laws, this Court in the case of Pacific Express Co. v. Seibert, 142 U. S. 339, 355, 35 L. Ed. 1035, Mr. Justice Lamar, speaking for this Court, said:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that *a system which imposes the same tax upon every species*

*of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."*

In the recent opinion of this Court in the case of Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. Ed. —— (page 456, Advance Sheets), Mr. Chief Justice Hughes, in discussing the powers of sovereignty of a State in dealing with tax legislation under the 14th Amendment, in speaking for this Court, said:

"* * * but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. *It may grant exemptions.* The state is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. *In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the 14th Amendment was intended to assure.* * * *."

On page 30 of his brief, appellant states:

"By an Act of 1917 the shareholder was not taxed if 25% of the corporation's property was in

Kentucky, and now by the Act of 1924, the shareholder is taxed unless at least 75% of the corporation's property be in Kentucky. The criterion adopted in either case is purely arbitrary. *The only conceivable reason for substituting 75% of property for 25% thereof is that the shareholders of more corporations are reached by the later Statute, whereby the tax-eater gets more money.* * * * "

We are wondering if appellant in the italicized part of the above excerpt is not measuring the corn of the Legislature of Kentucky in his half bushel. The legislative branch of our State government is in session only sixty days every two years unless called in extra session. We have had only two short extra sessions of our Legislature since the adoption of our Constitution in 1891. The Legislature for its services receives only an infinitesimal part of the State's revenue. While they have the power to fix their compensation within the limits of our Constitution, they have been exceedingly modest in fixing that compensation. The Legislature of Kentucky will compare favorably with the Legislature of any State in the Union and we can not conceive the reason for the bitterness in appellant's heart that generated the uncomplimentary remark italicized by us in the above excerpt.

However, the Legislature was confronted with the problem of raising funds to pay the expenses of governmental activities, and building up, conserving and bringing capital into the State. In doing this it at least placed less tax burden upon intangible personal property, as a whole, than was placed upon any other

property. If the appellant had examined the reports of the State Tax Commission for the years 1912-1914, 1917, and 1923, and had given to those reports the careful consideration that we believe the Legislature gave them, we are convinced that his remarks would have been more charitable to our State Legislature.

**An Examination of the Reports of State Tax Commission for 1912-1914, 1917 and 1923. Their Influence upon the Amendments to Section 4088.**

Section 6, on page 10 of the Report Special Tax Commission, State of Kentucky, 1912-1914, under the head of Recommendations, discloses that one of the objects sought to be attained is:

> "To actually raise the assessment of all property to its full cash value."

Upon examination of the Report of the State Tax Commission in 1917, on page 15, we find these significant remarks:

> "* * * We could extend the illustrations at great length, but we give these two because they are representative of all other classes of property. The two classes mentioned are not extreme cases, but represent the average. *Tangible personal property has not been assessed at exceeding 20% of its value,* while intangible personal property has hardly been assessed at all."

To a Legislature desiring to be fair with its taxpayers, desiring to avoid so far as possible the evils of

double taxation, and endeavoring to encourage the investment of capital in corporations that are utilizing the raw products and labor of Kentucky, that are investing a large part of the proceeds from the sale of their capital stock in property located in Kentucky, the above excerpt from the 1917 Report of the State Tax Commission furnishes food for thought and action. We think that the Kentucky Legislature exercised splendid legislative discretion and judgment in 1917, by providing in Section 4088 of the Kentucky Statutes, that the stock of all corporations that actually paid taxes on 25% of their total assets to Kentucky should be exempt from taxation. In considering the above report, the Legislature realized that throughout Kentucky in 1917, tangible personal property was being assessed at not exceeding 20% of its value; it realized that when a corporation had in Kentucky and paid taxes upon 25% of its total tangible assets, it was paying to Kentucky an amount of taxes substantially equal to the taxes that natural persons were paying on property equal in value to the total property owned by the corporation, and, in fairness to the stockholders of Kentucky, the Legislature exempted the shares of stock in the hands of the shareholder from taxation when it was disclosed that the corporation which issued the stock had paid taxes on 25% of its assets to Kentucky. One reason for this classification is that the corporations could not practice undervaluation of their tangible property as successfully as was being practiced by natural persons.

By this exemption, provided for in the 1917 Act, the Legislature sought to render justice to the corporations and stockholders who were paying taxes substantially equal to the taxes other property was paying, which was of equal value to the assets of the corporations. The shareholders in other corporations could not complain, because the tax levied upon their shares of stock was only a nominal amount in comparison with the taxes that were paid upon tangible property. This is true, although you take into consideration the fact that the tax on shares were paid on a valuation equal to 100% of its true value, because that stock was exempted from the payment of all taxes to *county, municipal, school and other taxing districts,* and this exemption was not granted to tangible property.

The creation of two classes of stock for the purpose of taxation, taxing one class because it was issued by a corporation that paid taxes upon less than 25% of its tangible property, and exempting the other class because the stock was issued by a corporation that paid taxes to Kentucky on 25% or more of all their tangible assets is not only justified as a classification by the principles enunciated in Kidd v. Alabama, *supra,* but under the recent case of Stebbins v. Riley, 268 U. S. 137, 141, 69 L. Ed. 884, wherein Mr. Justice Stone, in speaking for this Court on the powers of a State in classifying property for taxation, said:

> "* * * It may discriminate between property which has not borne its full share of taxation

*in the testator's lifetime* and other property passing to the same class of transferees. * * *"

This opinion was delivered in April, 1925, and if this Honorable Court believed then that a State was justified in making a discrimination between the transferees in inheritance tax, because a part of those transferees received property from a decedent *who in his lifetime had paid a certain tax, upon the property received,* and the other class of transferees *who received property from a decedent who failed to pay a certain tax on his property in his lifetime,* there can be no question but that Kentucky *was justified* in making a distinction between shares of stock that are issued by two corporations, one of which pays taxes on 25% or more of its tangible property, and the other which pays taxes upon less than 25% of its tangible property to the State, and in a classification that gives equality of treatment to both foreign and domestic corporations.

Again, this amendment of 1917 was fair because it prevented fraud. Under Section 4088, Kentucky Statutes, before the 1917 amendment, all a corporation, domestic or foreign, had to do to exempt all its shares of stock in hands of stockholders from taxation was to invest one dollar in property in Kentucky and report it for taxation. The amendment closed the door to this possible fraud.

Again, if appellant had made an examination of Table 3 on pages 70, 71, and 72 of the Report of Kentucky State Tax Commission for 1923, he would have discovered the reason why the 1924 Legislature by

Chapter 116 of the Acts for that year raised the percentage of property upon which a corporation was required to pay taxes, because its share of stock in the hands of shareholders could be exempt from taxation from 25% to 75%. This table discloses that the total assessed valuation of all the property of Kentucky in 1916 was $902,304,436, and that the valuation of this property had been continuously increased until in 1923, its total valuation was $2,205,588,007. Between the years 1916 and 1923, the valuation of the property of Kentucky had been *trebled,* and, in order to require the corporations operating in this State to be entitled to and have their stock exempted from taxation, since natural persons had *trebled* the valuation upon their property, it was nothing but fair that the corporations should be required to pay taxes upon at least three-fourths of their corporate assets before their shares should be entitled to exemption. So our Legislature, in its policy of gradually increasing the valuation of property to the ultimate goal of 100% of its true valuation, and, at the same time, requiring corporations to only pay the same tax that is paid by natural persons on property of the same true valuation, in 1924 increased the percentage of corporate property to be taxed from 25% to 75%, before the shares could be exempted, for the simple reason that natural persons had increased the valuation of their property to 75% of its true value, whereas, in 1917, they only valued their property at 20% of its true valuation.

In the facts disclosed in these three tax reports, we find the basis of the legislative judgment and discretion, and that judgment discloses an earnest effort by Kentucky to be fair in providing a law of taxation applicable to corporations and to natural persons, in an instance where the corporation owned property and a private person owned a remote and contingent interest therein, and as was said by Mr. Justice Stone in Stebbins v. Riley, *supra,* when passing upon a similar point:

> "* * * It is enough that the classification is reasonably founded in the 'purposes and policies of taxation.' Watson v. State Comptroller, 254 U. S. 122, 65 L. Ed. 170, 41 Sup. Ct. Rep. 43. It is not open to objection *unless it precludes the assumption that the classification was made in the exercise of legislative judgment and discretion.* Campbell v. California, *supra.*"

In our study of the power of the State to classify property for the purpose of taxation, by reason of appellant's charge of discrimination in Section 4088, Kentucky Statutes, we have been very much impressed with the case of Citizens' Telephone Company v. Fuller, Auditor, 229 U. S. 320-322, 57 L. Ed. 1206. In this case the State of Michigan had levied a tax against telephone companies, and the validity of this tax was being assailed because the law contained a provision which exempted all telephone companies from the payment of the tax, whose gross receipts within the State for the year ending June 30th did not exceed five hun-

dred dollars. It was the contention of the Citizens' Telephone Company in that case that a dollar's worth of property in a telephone company, whose gross receipts were less than five hundred dollars in a year, should pay the same tax that a dollar in a company whose gross receipts were greater than five hundred dollars. But this Court in that instance, sympathetically looked behind the cold letter of the law, which was apparently an arbitrary discrimination between the property of the companies whose gross receipts were less than five hundred dollars and the same or similar property when owned by a company whose gross receipts were greater than five hundred dollars, and sought the purpose of the classification. In doing so, it discovered that the companies as a whole whose gross receipts were less than five hundred dollars were non-profit earning corporations, engaged in the telephone business for the mutual convenience of their stockholders, and in the State of Michigan those corporations whose gross receipts were greater than five hundred dollars were, as a whole, profit-earning corporations which were operating telephone lines in that State for commercial purposes only, and in laying down the rules that govern a state under the 14th Amendment, in classifying property for taxation, in this case, Mr. Justice McKenna, speaking for this Court: said:

> "* * * Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous.

> Keeney v. New York, 222 U. S. 536, 56 L. Ed. 305, 38 L. R. A. (N. S.) 1139, 32 Sup. Ct. Rep. 105. The state is not bound by any rigid equality. This is the rule; its limitation is that it *must not be exercised in 'clear and hostile discriminations between particular persons and classes.'* "
>
> Citizens' Telephone Company v. Fuller, Auditor, 229 U. S. 320-322, 57 L. Ed. 1206.

As heretofore remarked, the Kentucky Legislature in fixing the amount of the tax to be paid by shares of stock in a corporation which does not pay taxes upon 75% of its tangible assets to the State, showed no indication of hostility, because the tax upon the stock is only nominal when compared to the burden which tangible property has to bear, the tangible property not only paying to the State the same tax that is required of the stock, but also bearing the burden of county, municipal, school and other district taxes from which the shares of stock has been exempted.

**Double Taxation upon the Property Within its Jurisdiction Owned by Residents of Kentucky is Not a Violation of Either the Due Process of Law or Equal Protection Clauses of the 14th Amendment to the Federal Constitution.**

The appellant has made his complaint as to the invalidity of Section 4088, Kentucky Statutes, under our Constitution, to the Courts of Kentucky, and in each instance his contention has been denied. The Court of Appeals of Kentucky spends a large part of its time in construing statutes and in determining whether or

not they are valid under our State Constitution. The learned Commissioner who wrote the opinion of the Appellate Court in the instant case is an ex-Chief Justice of that Court and has served on it many years, either as Chief Justice, Associate Justice, or Commissioner. His opinion, written under the supervision of our Appellate Court, is authoritative and binding on all parties concerned, so far as the Constitution and statutes of Kentucky are involved. We have earnestly endeavored to meet each of the objections appellant has made to Section 4088, Kentucky Statutes, under the provisions of the 14th Amendment to our Federal Constitution.

However, before closing this brief we desire to call the Court's attention to additional authority upon the power of the State to levy double or multiple taxes upon property when both the property and the owner are within and subject to the taxing jurisdiction of the State.

Volume 1, Cooley Taxation, Fourth Edition, Section 245, page 517, states:

> "* * * the position that it is not *double taxation* to impose one tax upon the property of a corporation, or upon its capital stock, and another tax upon the shares of the capital stock in the hands of the individual stockholders has been vigorously attacked. Some courts have held that it is double taxation. *On the other hand, most of the state courts, and the Supreme Court of the United States, have taken a different view, and have held that the shares of the capital stock of a corporation*

> *in the hands of the stockholders, though representing their interest in the property of the corporation, are, for the purposes of taxation, distinct from the property of the corporation,* and *from its capital stock in its hands, and that to tax both—the former to the corporation, and the latter to the stockholders—is not double taxation."*

But, for the sake of argument, admit that the rule is otherwise. So long as the State remains within the limits of reason as to the total tax levied and manifests no hostile or arbitrary discriminations to persons or property in the classification, what are the powers of the State?

In the case of St. Louis Southwestern Railway Company v. State of Arkansas, *ex rel.* Hal L. Norwood, Attorney General, 235 U. S. 350, 59 L. Ed. 265, Mr. Justice Pitney, in speaking for this Court, said:

> "Nothing in the 14th Amendment imposes any ironclad rule upon the states with respect to their *internal taxation,* or *prevents them from imposing double taxation,* or *any other form of unequal taxation,* so long as the inequality is not based upon arbitrary distinctions. * * * "

The long list of authorities cited by Mr. Justice Pitney immediately after the above excerpt, is sufficient evidence that the principle enunciated by him in the foregoing excerpt had long been one that had been repeatedly endorsed by this Court.

Again, in the case of Interstate Busses Corporation v. William H. Blodgett, 276 U. S. 243, 245, 72 L. Ed. 551, Mr. Justice Stone, in speaking for this Court, said:

> "* * * Appellant plainly does not establish discrimination by showing merely that *the two statutes are different in form or adopt a different measure or method of assessment,* or *that it is subject to three kinds of taxes while intrastate carriers are subject only to two or to one.* * * *"

Thus this Court definitely disposed of the question of multiple taxation.

Describing the powers of the State as to double taxation, Mr. Justice Holmes, in speaking for this Court in the case of Ft. Smith Lumber Co. v. Arkansas, *ex rel.* John D. Arbuckle, Attorney General, 251 U. S. 532, 64 L. Ed. 396, said:

> "The objection to the taxation as double may be laid on one side. *That is a matter of state law alone. The 14th Amendment no more forbids double taxation than it does doubling the amount of a tax,* short of confiscation or proceedings unconstitutional on other grounds. * * *"

In the recent case of Carley & Hamilton, *et al.,* v. Snook, etc., 281 U. S. 66, 74 L. Ed. 250 (Advance Sheets, p. 250, and on page 253 thereof), Mr. Justice Stone said:

> "The objection that the petitioners should not be required to pay the challenged fees because they are already paying the city license tax is but the familiar one, often rejected, *that a state may not, by different statutes, impose two taxes upon the same subject-matter, although, concededly, the total tax, if imposed by a single taxing statute, would not transgress the due process clause.* * * *"

The large number of cases cited in support of this pronouncement disclose that this declaration is no new doctrine. While many other decisions announcing the same principles could be cited, the opinions referred to above, together with others cited in this brief, are so plain and recent that we deem is unnecessary to burden this Court with other citations.

In making his contention as to double or multiple taxation, appellant seems to be relying upon the case of Farmers' Loan & Trust Company, as Sole Surviving Executor, etc., v. State of Minnesota, 280 U. S. 204, 74 L. Ed. ——, and the case of Safe Deposit and Trust Company of Baltimore, Maryland, v. Commonwealth of Virginia, 280 U. S. 83, 74 L. Ed. ——. It will be observed that the question before the Court in each of these cases was the situs for taxation and whether two states could levy an inheritance tax upon the transfer of the same property. But when this Court determined that ordinarily the situs for intangible property is at the domicile of the owner and limited the taxation of the transfer of that property from the dead to living hands to the state where the transfer occurred, it simply meant that the transfer of intangible personal property shall hereafter be taxed only in one state under the same rule as tangible personal property. We do not believe that the question in the instant case was before this Court in either of those cases and the mentioning of double or multiple taxation was only incidental.

**THE CASE OF LOUISVILLE GAS & ELECTRIC COMPANY v. CLELL COLEMAN IS NOT DECISIVE OF THE CASE AT BAR.**

When the case at bar was before the Court of Appeals of Kentucky, appellant earnestly insisted that the case of Louisville Gas & Electric Company v. Clell Coleman, 277 U. S. 32, 72 L. Ed. 770, was decisive of this case, but the Klein case is so apparently and conclusively different from the Louisville Gas & Electric Company case that the Court of Appeals, in speaking through Commissioner Hobson, in its opinion remarked, "But this Court is unable to see that it has any application." And, continuing, it said:

> "That case seems to rest upon the idea that long time mortgages are made by corporations and short time mortgages are made by the poor, whose credit is not good, and that the statutes taxed the corporations and exempted from taxation individuals."

After quoting the above excerpt from the opinion of the Court of Appeals, appellant, on page 38 of his brief, then remarks:

> "This Court certainly said nothing in the Coleman case to indicate that its decision rested upon the ground that the long-time mortgages were made by corporations and short-time mortgages by the poor, and that the statute was void for taxing corporations and exempting individuals; nor indeed did this Court hold that the statute taxed corporations and exempted individuals."

The foregoing insinuation against the Court of Appeals of Kentucky and Commissioner Hobson, by appellant in his brief, is unfair, because the opinion in the Klein case, in neither the excerpt quoted from that opinion nor any other part of it states or suggests that the decision of this Court in the case of Louisville Gas & Electric Co. v. Coleman, *supra,* "rested upon the ground that the long-time mortgages were made by corporations and short-time mortgages by the poor" or "that the statute was void for taxing corporations and exempting individuals." Neither did the opinion charge that this Court held "that the statute taxed corporations and exempted individuals." The excerpt from the opinion, when construed fairly, only undertook to state what the Legislature of Kentucky, in adopting the mortgage recording tax, attempted to do, and that was to exempt the short term mortgages, which are usually executed by those in financial distress, and to tax the long term mortgages, which are usually executed by corporations to a non-resident trustee as the basis for issuing a debenture bond, payable to bearer, with interest coupons attached. These were the two classes that the Legislature and the courts locally recognized in the passage of the mortgage recording act and its construction by the Court. Locally the difference in the two classes was as significant as the difference between day and night, and Commissioner Hobson in the quoted excerpt was only stating a fact that

was known and understood by practically every professional and business man of Kentucky.

Further, the fact that the notes, to secure which the short term mortgages were executed, did not escape taxation and, upon the other hand, the debenture bonds for which the long term mortgages were executed did escape taxation, was known by both the Legislature and courts of Kentucky.

The differences in the two classes were not disclosed to this Court of record when the mortgage recording tax was before it for adjudication. The committee in the Legislature that reported this bill for adoption did not disclose in its official report the basis for the classification that it made in that taxing act, and the Commonwealth of Kentucky was unable to lay before this Court the basis of the classification and its relation to the objects of the legislation. This Court had before it nothing but the cold letter of the act and it appeared to be arbitrary, and it so held.

If the Commonwealth of Kentucky could have placed before this Court the real basis for the classification, we believe that the decision of the Court would have been entirely different. Our reason for this statement is the fact that in the case of Citizens' Telephone Co. v. Fuller, *supra,* this Court had before it an act that on its face was clearly as arbitrary as the provisions in the Mortgage Recording Act of Kentucky.

In the case of Citizens' Telephone Co. v. Fuller, *supra*, the State of Michigan had levied a tax upon telephone companies, but the act that authorized the levy

contained a provision that exempted all telephone companies from the tax whose gross receipts for the year were less than five hundred dollars. The validity of the act was attacked because it was contended that a dollar's worth of property in a company whose gross receipts were less than five hundred dollars was not required to pay the same tax that a dollar in a telephone company whose gross receipts in a year were more than five hundred dollars.

In that case, Michigan was able to put in the record the facts that the telephone companies in Michigan whose income was less than five hundred dollars were, as a class, non-profit companies, operated for the mutual benefit of those that owned the stock in the corporation, and that the telephone companies whose incomes were greater than five hundred dollars were, as a class, corporations operated for commercial purposes; and it was the intention of the Legislature to tax only the profit-earning corporation. The ability of the State of Michigan to place these facts in the record enabled this Court to look behind the cold letter of the Act and discover the real basis for the classification and with these facts before it, it sustained the validity of the Michigan Act as in all probability it would have sustained the Mortgage Recording Act of Kentucky if the facts which were the basis of the classification in the later case had been disclosed in the record.

There is another distinction between the case of Louisville Gas & Electric Co. and the case at bar. In the former case, the Legislature placed the short term

mortgages in the exempted class because they were executed to secure the payment of notes upon which Kentucky realized a property tax and it placed the long term mortgages in a class to be taxed because they were executed to secure the payment of a debenture bond, which escaped the payment of a property tax to Kentucky, and the Legislature was seeking, by a privilege tax, to indirectly tax the owners of the debenture bonds, because the owners thereof were escaping the payment of a property tax thereon. The collection of a property tax on the notes or the debenture bonds held by the mortgagee or the failure to collect a property tax on all those properties was not the proper basis for the classification attempted, because it was not related to the object of the legislation, which was the collection of revenue by a privilege tax upon the right of a mortgagee to record his mortgage.

Section 4088, Kentucky Statutes, deals with a different proposition. A corporation owns and has possession of physical assets. The shareholders in that corporation own a remote and contingent interest in the same property. Section 4088, Kentucky Statutes, exempts the shareholder from taxation upon his share of stock, provided the corporation issuing the share had paid to Kentucky taxes upon 75% of its tangible property, because the corporation by that payment is paying a tax substantially equal to the tax that natural persons pay upon property of equal value. The tax that is paid by the corporation upon the physical assets, the tax that the stock is exempted from paying,

are both property taxes. The basis of the classification is grounded in property tax and is related to the object of the legislation which is the collection of revenue by a property tax, and brings the instant case within the limits of permitted classification under the 14th Amendment to the Federal Constitution.

**IF THE EXEMPTION IN SECTION 4088, KENTUCKY STATUTES, IS INVALID, IT DOES NOT RELIEVE APPELLANT FROM THE OBLIGATION OF PAYING THE TAX COMPLAINED OF.**

The main complaint of appellant in this case is that the exemption that is granted to a certain class of stockholders in Section 4088, Kentucky Statutes, is invalid. He states that this exemption is granted on an arbitrary classification. If this is true and the exemption is eliminated, then all stockholders will be required to pay the tax, and we cannot discover any advantage that would come to appellant by reason of invalidating the exemption under the 14th Amendment. This Court would not undertake to invalidate the whole revenue measure because the exemption was invalid.

The importance of this proposition is manifest when you take into consideration that Section 4088 as it now appears in the Kentucky Statutes had its origin in the Act of the Legislature which constitutes Chapter 11 of the Acts of 1917. The Legislature at that time undertook to reform the revenue laws of Kentucky so as to harmonize them with the amendment to Section 171 of our present Constitution, which was ratified by the people at the November, 1915, regular

election. Section 4088, Kentucky Statutes, is a part of Chapter 11 of the Acts of 1917. Chapter 11 consists of eleven sections. Section 3 of that chapter as amended by the Act of 1924, constitutes Section 4088, Kentucky Statutes. Under Chapter 11 of the 1917 Acts, all *ad valorem* taxes are levied upon all property of Kentucky and Section 3 thereof grants exemption from taxation of shares of stock in the hands of the shareholder, provided the corporation issuing the stock had listed 25% of all of its tangible assets for taxation in Kentucky, and this Section 3 is now Section 4088, Kentucky Statutes. Chapter 11 of the Acts of 1917 superseded all previous acts as to *ad valorem* taxes and specifically repeals them. The changing of the percentage of property of the corporation that is taxed from 25% to 75% in 1924 is simply an amendment to Chapter 11 of the Acts of 1917, which chapter is copied in full on page 110 of the Appendix attached hereto.

It is our contention that if you strike down Section 4088 of the Kentucky Statutes as an invalid exemption, all of the other provisions embraced in Chapter 11 of the Acts of 1917 will remain in full force and effect and under its remaining sections appellant will be required to pay the tax complained of, because, under Chapter 11 with Section 3 (Section 4088, Kentucky Statutes) eliminated, all stock in the hands of the shareholder will be subject to the *ad valorem* tax therein provided.

The United States Circuit Court of Appeals for the Eighth Circuit in the case of Chicago, Milwaukee &

St. Paul Railway Company v. Westby, 178 Fed. 619, 17 L. R. A. (N. S), 105, clearly stated the rules as to when the valid parts of a partly invalid statute would be sustained. It said the indispensable conditions of such a result are:

> "(1) That the constitutional part and the unconstitutional part are capable of separation so that each may be read and may stand by itself (Baldwin v. Franks, 120 U. S. 679, 685, 686, 30 L. Ed. 766, 768, 769, 7 Sup. Ct. Rep. 656, 763;
>
> "(2) That the unconstitutional part is not so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the Legislature in enacting it; and
>
> "(3) That the insertion of words or terms is not necessary to separate the constitutional part from the unconstitutional part and to give effect to the former only."

Under these rules thus laid down by the United States Circuit Court of Appeals for the Eighth Circuit, even if Section 4088 is invalidated, the judgment of the Court of Appeals should be affirmed, because with Section 4088 of the Kentucky Statutes eliminated, appellant owes the tax.

In this connection, we feel it our duty to direct this Court's attention to the fact that the 1924 Session of the Legislature of Kentucky repealed, amended and reenacted all the sections of Chapter 11 of the Acts of 1917 by the adoption of an act that is embraced in Chapter 116 of the 1924 Acts of Kentucky. In keeping

with our contention that if the exemption is invalid the balance of the Act as amended by 1924 stands, we wish to emphasize Sections 11 and 13 of Chapter 116 of the Acts of 1924. For the convenience of the Court we quote Section 11, as follows:

> "Section 11. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional, the decisions of the courts shall not affect or impair any of the remaining provisions of this act. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions not been included therein."

The Legislature has made it clear to the Courts that if any provision of Chapter 11 of the Acts of 1917 as amended by Chapter 116 of the Acts of 1924 be held unconstitutional it was the legislative intent that this act would have been adopted, regardless of the fact that one or more provisions be held by the Courts to be invalid. Thus the rules of statutory construction become unnecessary.

Section 13 of the Act is as follows:

> "Section 13. Whereas, the present State revenue and taxation laws impose an unequal burden of taxation upon real estate, and it is necessary for an immediate equalization of the distribution of the burden of taxation upon the various classes of property in this Commonwealth, an emergency is declared to exist, and this act shall become a law

and effective upon its passage and approval by the Governor."

Thus the Legislature discloses that the 1924 amendment to Chapter 11 of the 1917 Act was adopted to equalize the burden of taxation. After the assessment of the property of individuals had been trebled it would have been unfair to other propertyholders to have permitted shares of stock to be exempted when the corporation paid taxes to Kentucky on 25% of its tangible assets. So they raised the percentage of property to be taxed to 75%.

## CONCLUSION.

We believe that the purpose of the Legislature in creating the classification disclosed in Section 4088, Kentucky Statutes, was,

1. The requirement of all property to pay some taxes;
2. The avoidance, so far as possible, of double taxation;
3. The encouragement of Kentucky capitalists to invest in shares of stock in corporations which are investing the proceeds from the sale of their capital stock in property in Kentucky and conducting their business in this State, utilizing our raw products and labor, which is an exercise of the powers that are permitted under the 14th Amendment,

and that the judgment of the Court of Appeals was right; and we respectfully pray an affirmance of that judgment.

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M. B. HOLIFIELD,
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# APPENDIX.

## THE RECOMMENDATIONS.

**The following chapter, "The Recommendations," copied from report of the Special Tax Commission of the State of Kentucky, 1912-14, and immediately preceding Chapter 1 in that Report.**

The recommendations and the reasons therefor are fully set forth in the following pages of this report. They are finally embodied in drafts of several proposed bills. They may be summarized as follows:

1. It is proposed to establish a permanent Central Tax Commission in charge of all taxation in the State and responsible for the just administration of the tax laws, which shall specifically:

*a.* Have and exercise strict supervision over the local assessment officers, instruct and guide them in all their work, and after the term of office of the County Assessors, recently elected has expired, to organize a corps of expert assessors, under civil service rules, to take the place of the one hundred and twenty County Assessors who now work without supervision, instruction or training. Create larger assessment districts by the combination of counties into groups, so that assesors shall have work enough to occupy them the year round.

*b.* Take the place of the present State Board of Equalization.

*c.* Exercise control over the local boards of superviors and to guide them in their work.

*d.* Do the work of assessing railroads, franchises, bank stock and other property now assessed by ex-officio boards.

*e.* Look after the license taxes, inheritance taxes and all other taxes.

2. To change the law so that the initiative in finding and assessing the property shall lie with the Assessor and the State Tax Commission, making it less necessary to depend upon the taxpayer's statement, although that statement much simplified in form is still retained.

3. To provide that the Assessor shall be adequately equipped with tools to work with, especially with adequate maps, so that all property shall be assessed and equitably assessed.

4. To provide that the work of completely revaluing and assessing of real estate shall be done but once every four years, with a view to:

*a.* Greater thoroughness.

*b.* Saving of expense.

5. To amend the law relative to assessments made at present by the State Board of Valuation and Assessments (to be succeeded by the State Tax Commission) for three purposes:

*a.* To correct certain infelicities in the language of the statutes which have tied the hands of the Board and led to serious litigation.

*b.* Increase the powers of the assessing officers, so that the assessments may be more equitable and just.

*c.* To extend the franchise tax to *all* franchises.

6. *To actually raise the assessment of all property up to its full cash value.*

7. As soon as purpose six is effected, to limit the powers of local boards to fix the tax rates, so that the taxpayer can feel assured that he will not be over-taxed, but such limits may be exceeded by special vote of the people.

8. To so amend the laws relative to the collection of taxes that there can be a proper audit, and to make it practically impossible for dishonest officials to collect money under the guise of taxes, which never goes into the public coffers.

9. To abolish the "tax sharks," by giving the delinquent taxpayer ample opportunity to redeem his property, and then if he still fails to pay, turning the property over to the State, so that the profit, if any, resulting shall be for the benefit of all the people and not for the enrichment of a few (often non-resident) sharpers.

10. Ultimately to comply with the mandate of the people expressed through their approval of the constitutional amendment, by exempting public bonds, and making securities, or, in other words, mortgages, bonds and other *choses in action,* a special class of property to be taxed by a method which will bring them out of hiding. How soon this can be done depends on the decision in the case now pending before the Court of Appeals.

11. To remove all necessity for revenue agents, and abolish them.

12. To revise entirely all of those chapters of the revenue law which relate to the taxation of property in general to the following ends:

*a.* To insert in their proper place the new provisions, and

*b.* To make the arrangement logical and clear.

The old law has been patched onto at various times in such fashion that it now contains some contradictions, many useless repetitions, and is badly arranged.

## MATTERS DEEMED OF INTEREST.

**"Matter Deemed of Interest" is a part of a Report of Kentucky State Tax Commission for 1917, and the part quoted commences on page 13 and ends on page 15 of that Report.**

When the State Tax Commission was organized the work of preparing the necessary blanks, books, instructions and data was immediately commenced. It has been made the duty of the State Tax Commission to prepare all necessary schedule and other blanks relating to the assessment of property. This was a great task and was accomplished under great pressure, as many of the blanks had to be prepared without delay. We found that in the past taxpayers had hardly been requested to assess their property for taxation, and we believed that much could be accomplished if they were at least asked to assess their property. We found, what everyone knew, that only a small percentage of property, less than one-third, was assessed for taxation in the State. The value of the taxable property in the State of Kentucky is not less than $3,500,000,000. The assessed value of all property in the State was a little more than $1,000,000,000. No property has been really "assessed" for taxation except that which was required to be assessed by the State Board of Valuation and Assessment. All other property on which taxes were paid was simply "listed" by the taxpayer with the county assessor. The State of Kentucky and the various counties were, in effect, supported, so far as they were supported at all, by voluntary donations, and each donor sought to contribute a little less than his nieghbor owning property of the same value. This led to inequalities and iniquities that made it impossible for a conscientious taxpayer to assess his property in the State, as the burden of supporting the government fell too heavily upon him. Under the old plan the finances of the State have not increased as the necessity

for expenditures have increased. The result is that Kentucky has not made the progress which she would have made if the State and the county had adopted a system of taxation which would have brought in more revenue in a just and an equitable way. The trouble with the State is not that it spends too much money, but rather that it spends too little. A State or county cannot get the things that are necessary to make it a good place in which to live unless it is willing to pay for such things. The State should always have money to spend when the thing for which it is spent is of more value to the people than the money so expended, and no money should ever be spent by the State unless the things for which it is spent is of more value than the money thus expended. Following this rule, the State would cease to spend some thousands of dollars that is now expended, but it would spend many more thousands to get the things which are necessary to make it a place where a progressive citizenship would delight to live.

The old plan of taxation penalized the man who had regard for the law and rewarded the man who ignored the law. The more honest a man was in making his assessment, the greater the penalty imposed upon him, and the greater his disregard for the law, the greater his reward.

Comparing counties with counties, we found that in some the average assessed value of real estate was as low as 30% of its actual value, while in some it was as high as 80%. The taxpayers in the highest assessed counties paid into the State treasury $2.66⅔ every time the taxpayers in the lowest assessed counties paid into the State treasury $1.00 on property of the same actual value. The average assessed value of mules per head was as low as $36 in some counties, while in others the average was as high as $107. For every dollar paid into the State treasury by the lowest assessed counties on this class of property, the highest assessed counties paid into the State treasury $3.00 on property of the same value. We could extend the illustrations at great length, but we give these two because they are representa-

tive of all other classes of property. The two classes mentioned are not extreme cases, but represent the average. *Tangible personal property has not been assessed at exceeding 20% of its value, while intangible personal property has hardly been assessed at all.*

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## TABLE No. 3.

**Excerpts from Table No. 3, excerpt for 1916 appearing on page 70, and excerpt for 1923 on page 22, of the 6th Annual Report, Kentucky State Tax Commission for 1923.**

Assessment for the year 1916, showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | | | |
|---|---|---|---|---|---|
| Assessed value of bank deposits | $ 10,235,846 | @ | 55c | $ 56,297.15 or | 1.13% |
| Assessed value of intangibles | 74,066,756 | @ | 55c | 407,367.15 or | 8.21% |
| Assessed value of lands | 382,110,547 | @ | 55c | 2,101,608.00 or | 42.35% |
| Assessed value of town lots | 315,571,224 | @ | 55c | 1,735,641.73 or | 34.97% |
| Assessed value of tangible personalty | 120,320,068 | @ | 55c | 661,760.34 or | 13.34% |
| | $902,304,436 | @ | 55c | $4,962,674.37 or | 100. % |

Assessment for the year 1923, showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | | | |
|---|---|---|---|---|---|
| Assessed value of bank deposits | $ 272,201,630 | @ | 10c | $ 272,201.63 or | 3.44% |
| Assessed value of intangibles | 330,516,419 | @ | 40c | 1,322,065.68 or | 16.70% |
| Assessed value of lands | 772,137,740 | @ | 40c | 3,088,550.96 or | 39.03% |
| Assessed value of town lots | 461,223,988 | @ | 40c | 1,844,895.95 or | 23.32% |
| Assessed value of live stock | 31,102,086 | @ | 10c | 31,102.09 or | .40% |
| Other tangible personal property | 338,406,144 | @ | 40c | 1,353,624.58 or | 17.11% |
| | $2,205,588,007 | | | $7,912,440.89 or | 100. % |

# TABLE No. 3.

## Table No. 3, on pages 82 to 85, inclusive, of the 11th Annual Report, Kentucky State Tax Commission for 1928.

**A tabulation of the assessment for the years 1917 to and including 1928, showing the assessed valuation of the various kinds of property and the amount of revenue derived from each for the years named above, and the percentage of the burden as borne by each kind of property for each of said years.**

Assessment for the year 1917, showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | |
|---|---|---|---|
| Assessed value of bank deposit | $ 11,177,196 @ 55c | $ 61,474.58 or | 1.21% |
| Assessed value of intangibles | 68,750,880 @ 55c | 378,129.84 or | 7.45% |
| Assessed value of lands | 391,694,806 @ 55c | 2,154,321.43 or | 42.46% |
| Assessed value of town lots | 322,140,632 @ 55c | 1,771,773.48 or | 34.92% |
| Assessed value of tangible personalty | 128,692,967 @ 55c | 707,811.32 or | 13.96% |
| | $922,456,481 @ 55c | $5,073,510.65 or | 100. % |

Assessment for the year 1918 showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | |
|---|---|---|---|
| Assessed value of bank deposits | $ 179,143,180 @ 10c | $ 179,143.18 or | 3.17% |
| Assessed value of intangibles | 246,348,379 @ 40c | 985,393.52 or | 17.46% |
| Assessed value of lands | 529,390,432 @ 40c | 2,117,561.73 or | 37.52% |
| Assessed value of town lots | 341,592.377 @ 40c | 1,366,369.51 or | 24.21% |
| Assessed value of live stock | 50,314,861 @ 10c | 50,314.86 or | .89% |
| Other tangible personal property | 236,332,001 @ 40c | 945,328.00 or | 16.75% |
| | $1,583,121,230 | $5,644,110.80 or | 100. % |

Assessment for the year 1919 showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | |
|---|---|---|---|
| Assessed value of bank deposits | $ 209,363,034 @ 10c | $ 209,363.03 or | 2.89% |
| Assessed value of intangibles | 364,095,157 @ 40c | 1,456,380.63 or | 20.42% |
| Assessed value of lands | 660,226,382 @ 40c | 2,640,905.53 or | 37.03% |
| Assessed value of town lots | 367,902,150 @ 40c | 1,471,608.69 or | 20.58% |
| Assessed value of live stock | 74,693,209 @ 10c | 74,693.20 or | 1.05% |
| Other tangible personal property | 321,166,759 @ 40c | 1,284,666.32 or | 18.03% |
| | $1,997,446,691 | $7,137,617.31 or | 100. % |

Assessment for the year 1920, showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | |
|---|---|---|---|
| Assessed value of bank deposits | $ 260,919,320 @ 10c | $ 260,919.32 or | 3.6 % |
| Assessed value of intangibles | 275,486,887 @ 40c | 1,101,947.55 or | 15.4 % |
| Assessed value of lands | 731,798,075 @ 40c | 2,927,192.30 or | 40.9 % |
| Assessed value of town lots | 367,283,463 @ 40c | 1,549,133.85 or | 21.6 % |
| Assessed value of live stock | 67,279,693 @ 10c | 67,270.69 or | .9 % |
| Other tangible personal property | 311,544,307 @ 40c | 1,246,177.22 or | 17.6 % |
| | $2,034,302,745 | $7,152,640.93 | |

Assessment for the year 1921, showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | |
|---|---|---|---|
| Assessed value of bank deposits | $ 284,161,828 @ 10c | $ 284,161.83 or | 3.65% |
| Assessed value of intangibles | 321,148,823 @ 40c | 1,284,595.29 or | 16.54% |
| Assessed value of lands | 760,159,888 @ 40c | 3,040,639.55 or | 39.15% |
| Assessed value of town lots | 412,874,991 @ 40c | 1,651,499.97 or | 21.27% |
| Assessed value of live stock | 55,818,452 @ 10c | 55,818.45 or | .72% |
| Other tangible personal property | 362,341,756 @ 40c | 1,449,367.92 or | 18.67% |
| | $2,196,505,738 | $7,766,082.11 or | 100. % |

Assessment for the year 1922 showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | |
|---|---|---|---|
| Assessed value of bank deposits | $ 270,121,440 @ 10c | $ 270,121.00 or | 3.6 % |
| Assessed value of intangibles | 309,704,155 @ 40c | 1,238,816.62 or | 16.7 % |
| Assessed value of lands | 757,444,109 @ 40c | 3,029,776.43 or | 40.8 % |
| Assessed value of town lots | 438,132,922 @ 40c | 1,752,531.69 or | 23.6 % |
| Assessed value of live stock | 31,682,831 @ 10c | 31,682.83 or | .4 % |
| Other tangible personal property | 276,087,129 @ 40c | 1,104,348.52 or | 14.9 % |
| | $2,083,172,586 | $7,427,277.53 or | 100. % |

Assessment for the year 1923, showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | |
|---|---|---|---|
| Assessed value of bank deposits | $ 272,201,630 @ 10c | $ 272,201.63 or | 3.44% |
| Assessed value of intangibles | 330,516,419 @ 40c | 1,322,065.68 or | 16.70% |
| Assessed value of lands | 772,137,740 @ 40c | 3,088,550.96 or | 39.03% |
| Assessed value of town lots | 461,223,988 @ 40c | 1,844,895.95 or | 23.32% |
| Assessed value of live stock | 31,102,086 @ 10c | 31,102.09 or | .40% |
| Other tangible personal property | 338,406,144 @ 40c | 1,353,624.58 or | 17.11% |
| | $2,205,588,007 | $7,912,440.89 or | 100. % |

Assessment for the year 1924, showing the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | | |
|---|---|---|---|---|
| Assessed value of bank deposits | $ 317,319,996 | @ 10c | $ 317,320.00 or | 3.94% |
| Assessed value of intangibles | 396,829,363 | @ 50c | 1,984,146.81 or | 24.69% |
| Assessed value of lands | 779,408,115 | @ 30c | 2,338,224.35 or | 29.09% |
| Assessed value of town lots | 498,900,710 | @ 30c | 1,496,702.13 or | 18.63% |
| Assessed value of live stock | 33,314,828 | @ 50c | 166,574.14 or | 2.08% |
| Assessed value of other tangible property | 346,733,788 | @ 50c | 1,733,668.89 or | 21.57% |
| | $2,372,506,790 | | $8,036,836.32 or | 100.00% |
| Total real estate | 1,278,308,825 | @ 30c | 3,834,926.46 or | 47.72% |
| Total personal property | 1,094,197,965 | | 4,201,909.86 or | 52.28% |

Assessment for the year 1925, showirg the amount of taxes paid by various kinds of property, also percentage as paid by each.

| | | | | |
|---|---|---|---|---|
| Assessed value of bank deposits | $ 341,035,080 | | $ 341,035.08 | 3.9 % |
| Assessed value of intangibles | 501,403,120 | | 2,507,015.60 | 29. % |
| Assessed value of lands | 757,519,751 | | 2,272,559.25 | 26.3 % |
| Assessed value of town lots | 553,448,799 | | 1,160,346.39 | 19.2 % |
| Assessed value of live stock | 19,083,225 | | 95,416.13 | 1.1 % |
| Assessed value of other tangible personal property | 352,747,808 | | 1,763,739.04 | 20.5 % |
| | $2,525,237,783 | | $8,640,111.49 | 100.00% |
| Total real estate | $1,310,968,550 | @ 30c | $3,932,905.65 | |
| Total personal property | 1,214,269,233 | | 4,707,205.84 | |

Assessment for the year 1926, showing amount of taxes paid by various kinds of property, also percentage of the tax as paid by each.

| | | | | |
|---|---|---|---|---|
| Assessed value of bank deposits | $ 334,975,190 | @ 10c | $ 334,975.19 | 3.76% |
| Assessed value of intangibles | 528,729,976 | @ 50c | 2,643,649.88 | 29.68% |
| Assessed value of lands | 748,817,906 | @ 30c | 2,246,453.72 | 25.22% |
| Assessed value of town lots | 603,525,400 | @ 30c | 1,810,576.20 | 20.33% |
| Assessed value of live stock | 25,098,981 | @ 50c | 125,494.91 | 1.41% |
| Assessed value of tangible personal property | 349,125,557 | @ 50c | 1,745,627.78 | 19.60% |
| | $2,590,273,010 | | $8,906,777.68 | 100. % |
| Total real estate | $1,352,343,306 | | $4,057,029.92 | |
| Total personal property | 1,237,929,704 | | 4,849,747.76 | |
| | $2,590,273,010 | | $8,906,777.68 | |

Assessment for the year 1927, showing amount of taxes paid by various kinds of property, also percentage of the tax as paid by each.

| | | | |
|---|---|---|---|
| Assessed value of bank deposits | $ 349,146,540 @ 10c | $ 349,146.54 | 3.95% |
| Assessed value of intangibles | 490,549,380 @ 50c | 2,452,746.90 | |
| Assessed value of bank shares | 75,228,316 @ 50c | 376,141.58 | 31.85% |
| Assessed value of lands | 734,405,418 @ 30c | 2,203,216.25 | 24.80% |
| Assessed value of town lots | 630,357,076 @ 30c | 1,891,071.23 | 21.29% |
| Assessed value of live stock | 26,681,803 @ 50c | 133,409.02 | 1.50% |
| Assessed value of tangible personalty | 295,060,027 @ 50c | 1,475,300.14 | 16.61% |
| | $2,601,428,560 | $8,881,031.65 | 100. % |

Assessment for the year 1928, showing amount of taxes paid by various kinds of property, also percentage of the tax as paid by each.

| | | | |
|---|---|---|---|
| Assessed value of bank deposits | $ 360,214,474 @ 10c | $ 360,214.47 | 3.74% |
| Assessed value of intangibles | 495,506,610 @ 50c | 2,477,533.05 | |
| Assessed value of bank shares | 76,436,507 @ 50c | 382,182.53 | 29.65% |
| Assessed value of lands | 728,925,897 @ 30c | 2,186,777.69 | 22.68% |
| Asessed value of town lots | 650,455,979 @ 30c | 1,951,367.94 | 20.24% |
| Assessed value of live stock | 28,861,102 @ 50c | 144,305.51 | 1.50% |
| Assessed value of tangible personal property | 427,913,533 @ 50c | 2,139,567.66 | 22.19% |
| | $2,768,314,102 | $9,641,948.85 | 100.00% |

Tabulation showing the percentage of State revenue as borne by each class of property from the year 1926 to and including 1928.

| | 1917 | 1918 | 1919 | 1920 | 1921 | 1922 |
|---|---|---|---|---|---|---|
| Lands | 42.46% | 37.52% | 37.03% | 40.9% | 39.15% | 40.8% |
| Town lots | 34.92% | 24.21% | 20.58% | 21.6% | 21.27% | 23.6% |
| Intangible property | 7.45% | 17.46% | 20.42% | 15.4% | 16.54% | 14.3% |
| Tangible property | 13.96% | 16.75% | 18.03% | 17.6% | 18.67% | 16.7% |
| Bank deposits | 1.21% | 3.17% | 2.89% | 3.6% | 3.65% | 3.6% |
| Live stock | ..... | .89% | 1.05% | .9% | .72% | .4% |

| | 1923 | 1924 | 1925 | 1926 | 1927 | 1928 |
|---|---|---|---|---|---|---|
| Lands | 39.03% | 29.09% | 26.30% | 25.22% | 24.80% | 22.68% |
| Town lots | 23.32% | 18.66% | 19.20% | 20.33% | 21.29% | 20.24% |
| Intangible property | 16.70% | 24.69% | 29. % | 29.68% | 31.85% | 29.65% |
| Tangible property | 17.11% | 21.57% | 20.5 % | 19.60% | 16.61% | 22.19% |
| Bank deposits | 3.44% | 2.08% | 3.9 % | 3.76% | 3.95% | 3.74% |
| Live stock | .40% | 3.94% | 1.16% | 1.41% | 1.50% | 1.50% |
| | | | | | | 100.00% |

## CHAPTER 11.

**Chapter 11, appearing on pages 44 to 53, inclusive, of Acts of the General Assembly of the Commonwealth of Kentucky, passed at the Extraordinary Session of the General Assembly, which was begun in the City of Frankfort, Ky., on Wednesday, February 14, 1917, and ended Wednesday, April 25, 1917, Section 3 thereof being Section 4088, Carroll's Kentucky Statutes 1915 Edition, Chapter 108, p. 2070.**

AN ACT relating to revenue and taxation, providing an annual tax upon property subject to taxation in this State, fixing the rate thereof, distributing said tax to various departments and State institutions, providing manner and means of assessing and listing corporate property, and shares of stock, designating what classes of property shall be subject to local taxation, fixing time for collecting taxes on omitted personal property in certain cases, requiring record of assignment of evidences of indebtedness secured by mortgages in certain cases, requiring fiduciaries to file inventories of trust property, conferring power on taxing authorities to examine books and accounts of fiduciaries, requiring payment of taxes before final discharge, providing an additional tax for recording certain mortgages, making failure to pay taxes a bar to enforcement of indebtedness in certain cases, fixing penalties and repealing existing statutes.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

§ 1. **Annual Taxes—How Divided.** An annual tax of forty (40) cents upon each one hundred dollars ($100.00) of value of all property directed to be assessed for taxation, as hereinafter provided, shall be paid by the owner, person or corporation assessed. Of the aggregate amount of tax realized by all assessments, 21½ fifty-fifths shall be for the ordinary expenses of the government, 26 fifty-fifths for the support of the common schools, 2 fifty-fifths for the use of the sinking fund, ½ of one fifty-fifth for the University of Kentucky, and 5 fifty-fifths for the State road fund. The tax herein provided for the University of Kentucky shall be in lieu of the tax provided by an act entitled: "An act

for the benefit of the Agricultural and Mechanical College," approved April 29th, 1880. The tax herein provided for the State road fund shall be in lieu of the tax provided by an act entitled: "An act to create and establish a system of public State roads and to provide for the construction and maintenance thereof," approved March 24, 1914.

§ 2. **Property to be Assessed in Name of Corporation—Penalty for Failure to Report.** The property of all corporations, except where differently provided by law, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report under oath a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties provided by law for a similar failure by a natural person in listing his own property.

§ 3. **Exemption of Stockholders.** The individual stockholders of a corporation, at least one-fourth of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky (including the corporate franchise when the franchise is required to be assessed), provided the shareholder furnishes satisfactory proof to the taxing authorities that at least one-fourth of the total property of such corporation is taxed in Kentucky.

§ 4. **Property Subject to Local Taxation.** All property subject to taxation for State purposes as provided in Section 4020, Kentucky Statutes, shall be subject also to taxation in the county, city, school, or other taxing district, in which same has a taxable situs, except the following classes of property which shall be subject to taxation for State purposes only.

(1) Farm implements and farm machinery owned by a person actually engaged in farming and used in his farm operations.

(2) Machinery and products in course of manufacture of persons, firms, or corporations, actually engaged in

manufacturing, and their raw material actually on hand at their plants for the purpose of manufacture.

(3) Money in hand, notes, bonds, accounts and other credits, whether secured by mortgage, pledge or otherwise, or unsecured. Shares of stock not relieved from assessment under Section 3 of this act; provided, however, that nothing in this section shall forbid local taxation of franchises of corporations or of the shares of banks, trust companies, or combined banks and trust companies doing business in Kentucky, or domestic life insurance companies.

And provided, further, every State bank and trust company incorporated under the laws of this Commonwealth, and every National bank doing business therein and located in any county, city, town or taxing district in this Commonwealth shall make to the assessing officer of the county, city, town or taxing district a report showing the following facts, to-wit: The name and post-office address of the bank or trust company; the names of the president, cashier and board of directors thereof; the number of shares of stock, and the par and market value of each share; the amount of surplus fund and undivided profits; the amount of its deposits; the amount of cash on hand; the amount of bonds and other securities held by it; the amount loaned on mortgages and the amount of its loans and discounts; the amount of value of all real estate situated in this Commonwealth, held and owned by the bank or trust company on the first day of September of each year; and such other information as may be required. The assessing officer of the county, city, town or taxing district wherein any trust company, State and National bank is situated, shall assess the shares of such trust company, State and National bank for taxation for State, county, city, town and taxing district purposes. Each bank and trust company shall be entitled to have deducted from the total valuation placed on its shares by said board the assessed value of its real estate in this State. It shall be the duty of the trust company and banks to list with the county assessor of each county, and with the assessing of-

ficer in each city, town and taxing district its real estate and pay the taxes thereon to the sheriff and to the collecting officer of each city, town and taxing district, and such officer shall make out and return the assessment to the proper authorities of the county, city, town or taxing district, at the same time and manner as prescribed by law for the return of the assessment of personal property therein.

The equalization, collection, penalties and laws relating thereto, now provided by law for other personal property in the county, city, town or taxing district, shall apply in like manner to the collection of the taxes herein provided for: Any county, city, town or taxing district, not now having the right to collect such taxes by suit, is hereby authorized and empowered so to do. Nothing herein shall be construed to repeal or amend Chapter thirty-three of the Acts of 1904, approved March 18, 1904, entitled, "An act to amend the revenue laws of the cities of the first class so as to carry into effect the amendment of Section 181 of the present Constitution."

§ 5. **Report of Mortgage Assignments Required— Penalty.** Every bank, trust company or combined bank and trust company doing business in Kentucky shall on or before November 1st of each year file with the Tax Commission a report verified by the oath of its president, vice-president or cashier showing as of September 1st:

(a) A list of the notes, bonds or other evidences of indebtedness secured by mortgage or other recorded instrument standing in its name of record, which it has assigned during the preceding year without transferring same of record, the amount of each, and the name and address of the person to whom each was assigned; provided, that where the name and address is given of the transferee holding same on September 1st of any year, any previous transfers of said securities during that year need not be furnished.

(b) A list of the mortgages assigned of record to it during the preceding year with its knowledge or consent,

where it has not become the absolute owner of the debt secured thereby, standing in its name on September 1st, the amount of each of such mortgages and the name and address of each of such assignors; provided, any mortgages assigned to it as aforesaid during any year and paid and released of record prior to September 1st need not be included in such report.

Provided: however that the reports required under clause (a) or clause (b) need not include either sales or pledges from one bank, trust company or combined bank and trust company to another bank, trust company, or combined bank and trust company, or notes or obligations secured by any recorded instrument executed to a bank, trust company or a combined bank and trust company, in which the obligations secured by said instrument or divided among estates or accounts in charge of said bank, trust company, or combined bank and trust company, and regularly and properly entered on the records of said trust company, bank or combined bank and trust company.

Provided, further, the provisions of this section shall not apply to mortgages made by corporations to trustees to secure bond issues made by them in the regular course of business.

The information thus obtained shall be communicated by the Tax Commission so the Assessor and Board of Supervisors of the respective counties in which the true owners of such debts reside. Failure to file such reports shall be punishable by a fine of not less than fifty nor more than one hundred dollars and each day's delay or failure to file such report shall constitute a separate offense. Wilful false statement in such reports shall be punishable as false swearing.

Any person, firm or corporation which shall transfer or assign of record any mortgage note, or bond or other evidence of indebtedness, secured by any recorded instrument, for the sole purpose of evading the taxes thereon, shall be guilty of a misdemeanor and punishable by fine of not less

than one hundred ($100.00) nor more than one thousand ($1,000.00) dollars.

§ 6. **Ommitted Property—Penalty—Limitation.** When any money in hand, notes, bonds, accounts, or other credits, secured or unsecured, or shares of stock liable to assessment shall in any one year be omitted from assessment, under the provisions of this act, it may at any time not later than ten (10) years thereafter, be assessed retrospectively in the manner provided by Sections 4258 to 4267, Kentucky Statutes, except that, in addition to the penalty prescribed by those sections, a penalty of one hundred per cent. of the amount of the taxes and interest at six per cent. per annum from the time the taxes should have been paid, shall be recovered. Said additional penalty and interest shall be paid into the State Treasury.

Provided, further, that after September 1st, 1917, no action shall be commenced nor proceeding taken on behalf of the State or any county, city, town, or taxing district to assess for taxation for any period prior to September 1st, 1917, any personal property described in this section required to be listed for taxation which had theretofore been omitted or which may be claimed to have been omitted, if such property has been so listed for taxation as of September 1st, 1917; nor shall any pending action, prosecution, or proceeding be amended so as to include any such personal property listed as of said date.

§ 7. **Failure to List Choses in Action a Bar to Collection.** In addition to the penalties provided in the preceding section, failure to list any note or bond shall be a bar to any action upon the same in any court and may be pleaded as a complete defense. But the holder thereof may at any time pay all taxes, penalties and accrued interest and thereupon be relieved from the defense above provided.

§ 8. **Fiduciaries—Their Reports and Examination of Their Records.** Every executor, administrator, guardian, trustee, trustee in bankruptcy, receiver, or other person acting in a fiduciary capacity, shall when required, file with

the Tax Commission a sworn inventory showing in detail the amount and character of personal property which has come to his hands. Such inventory need not be filed with the Tax Commission if it has been filed as a public record in the court in which the fiduciary qualifies.

Said Tax Commission is hereby given express authority to examine the books and accounts of administrators, executors, curators, trustees and others acting in a fiduciary capacity. No such fiduciary shall receive a final discharge until he has satisfied the court settling his accounts that all taxes against the estate have been paid.

§ 9. **Mortgage Recording Tax.** The word "mortgage" as used in this section shall include any instrument creating or evidencing a lien of any kind upon property given or taken as security for debt and shall include vendor's liens and executory contracts for the sale of property under which the vendee is entitled to the possession thereof.

A tax of twenty (20) cents is hereby imposed upon each one hundred dollars ($100.00) or fraction thereof of indebtedness which is, or may be, in any contingency, secured by any mortgage of property in this State, which mortgage shall be lodged for record after this act goes into effect, where the indebtedness does not mature within five years. If any such mortgage includes property outside of the State, such tax shall be imposed upon such proportion of the whole debt secured thereby as the value of the property in this State included therein bears to the whole of the property included therein. The county clerk first receiving such instrument for record shall determine the amount of such tax from affidavits of the mortgagor or its officers as to such proportionate value or from other satisfactory evidence.

If a mortgage is made to a mortgagee in trust to secure the payment of bonds or other obligations to be issued thereafter, a statement may be incorporated therein of the amount and description of such obligations already issued or to be issued forthwith, and the tax to be paid on filing

such mortgage for record or registration shall be computed upon the amount so stated. Such statements shall be binding and conclusive upon all persons claiming through or under the mortgage, and no additional obligations shall be issued or certified by the trustee until the additional tax thereon shall have been paid and the receipt of the proper county clerk issued therefor, and recorded upon the margin of the record of said mortgage.

If any such mortgagor shall issue or if any such trustee shall certify or aid in the issuance of any such obligations without the payment of the tax as herein provided, they shall each be subject to a penalty of five times the amount of such tax that should have been paid.

The tax imposed by this act shall be paid to the clerk of the county court in whose office said mortgage is first lodged for record, at or before the time of lodging same for record. The clerk shall thereupon endorse his receipt upon said instrument, and such receipt shall be recorded with said instrument, and shall be conclusive proof of the payment of said tax, and shall authorize the further record of such instrument in any other county, without repayment of such tax. The form of such receipt shall be in substance: "Recording tax hereon of ..... dollars paid."

The clerk on or before the tenth day of each month transmit to the Auditor the amount of such taxes collected by him within the preceding calendar month, less the amount of his commissions now allowed him on collections of revenue. And the entire revenue from the mortgage recording tax shall be credited to the Sinking Fund.

The recording tax herein provided shall be in addition to the annual tax for State purposes provided in the preceding sections of this act; provided, however, the recording tax herein provided shall be the only tax paid on mortgages beneficially owned by persons or corporations not resident in this State. Provided, however, the provisions of this section shall not apply to mortgages executed to building and loan associations.

§10. **[Railroads to Furnish Copy of Reports to Tax Commission].** That all railroads operating in Kentucky shall furnish to the State Tax Commission of Kentucky upon its request, a true and correct copy of all printed or written report or reports to their stockholders of net income or earnings for the year in which the assessment is made, also will furnish to said Commission upon its request a true and correct copy of all their printed or written reports of net income or earnings furnished to the Interstate Commerce Commission for the year in which the assessment is made, and upon a failure of any such railroad company operating in Kentucky to comply with the provisions of this act it shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than five hundred dollars and not more than ten thousand dollars and any officer of such company knowingly making false statements or statements relative to said report or reports shall be subject, upon conviction, to the penalties provided under the felony laws of this State.

§11. **Repealing Clause.** Sections 4019, 4085, 4088, 4092a, 4092b, 4092c, and 4092d, Kentucky Statutes, Carroll's 1915 Edition, are hereby repealed. All other laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

[Catch-title in brackets inserted by compiler.]

Approved May 2, 1917.

## CHAPTER 116.

**Chapter 116, appearing on pages 402 to 415, inclusive, of Acts of the General Assembly of the Commonwealth of Kentucky, passed at the Regular Session of the General Assembly which was begun in the City of Frankfort, Ky., on Tuesday, January 8, 1923, and ended Wednesday, March 19, 1924, Section 3 thereof being Section 4088, Kentucky Statutes, Carroll's 1930 Edition, Chapter 108, p. 2086.**

AN ACT to amend and re-enact Section 1 of Chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, as amended and re-enacted by Section 1 of Chapter 4 of the Acts of the General Assembly of 1918; and to repeal Section 3 of Chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917; and to amend and re-enact Section 4 of Chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, as amended and re-enacted by Chapter 18 of the Acts of the General Assembly of 1922; and to amend and re-enact Section 5 of Chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917; and to amend and re-enact Section 6 of Chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917; and to repeal Section 1 of Chapter 65 of the Acts of the General Assembly of 1920; and to amend and re-enact Section 1 of Chapter 10 of the Acts of the Extraordinary Session of the General Assembly of 1917, as amended and re-enacted by Section 1 of Chapter 83 of the Acts of the General Assembly of 1920; and to amend and re-enact Sections 1 and 3 of Chapter 4 of the Acts of the Extraordinary Session of the General Assembly of 1917; being an Act relating to revenue and taxation, providing an annual tax upon property subject to taxation in this State, fixing the rate thereof, distributing said tax to various departments and State institutions, providing manner and means of assessing and listing corporate property and shares of stock, and shares in building and loan associations, designating what classes of property shall be subject to local taxation, fixing time for collecting taxes on omitted personal property in certain cases, requiring record of assignment of evidence of indebtedness secured by mortgage in certain cases, requiring fiduciaries to file inventories of trust property, conferring power on taxing authorities to examine books and accounts of fiduciaries, requiring payment of taxes before final discharge, providing an additional tax for recording certain mortgages, making failure to pay taxes a bar to enforcement of indebtedness in certain cases, fixing penalties and repealing existing statutes.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

§ 1. That section 1 of chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, approved May 2, 1917, as amended and re-enacted by section 1 of chapter 4 of the Acts of the General Assembly of 1918, approved March 5, 1918, be amended by repealing said section 1 of chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, and also by repealing section 1 of chapter 4 of the Acts of the General Assembly of 1918, and inserting in lieu thereof the following section, so that when said sections are amended by substituting and re-enacting the following section in lieu thereof, the same shall read as follows:

Section 1. Annual Taxes—How Divided. An annual ad valorem tax for state purposes of thirty (30c) cents upon each one hundred ($100.00) dollars of value of all real estate directed to be assessed for taxation, as provided by law, and fifty (50c) cents upon each one hundred ($100.00) dollars of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one (1%) per cent shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, as now provided by law; and also except building and loan associations incorporated under the laws of this State, and making loans to members only, which associations shall be assessed in the manner and at the rate now set forth in chapter fourteen of the Acts of Extraordinary Session of General Assembly of nineteen hundred and seventeen. Of the aggreate amount of tax realized by all assessments under the thirty (30c) cent rate, plus the aggregate amount of tax realized by all assessments of money in hand, notes, bonds, accounts and other credits, whether secured by mortgage, pledge or otherwise, or unsecured,

franchise and shares of stocks, twenty and seven-tenths thirtieths shall be used for the support of the common schools; one and fifteen hundredths thirtieths thereof plus four-sixteenths of the inheritance taxes for the support and erection of buildings for the University of Kentucky at Lexington, Kentucky; seventy-hundredths thirtieths plus one-sixteenth of the inheritance taxes for the support and erection of buildings for the Eastern Kentucky State Normal School and Teachers College at Richmond, Kentucky; seventy-nine hundredths thirtieths plus three-sixteenths of the inheritance taxes for the support and erection of buildings for the Western Kentucky State Normal School and Teachers College at Bowling Green, Kentucky; sixty hundredths thirtieths for the support and erection of buildings for the Murray State Normal School at Murray, Kentucky; sixty-hundredths thirtieths for the support and erection of buildings for the Morehead State Normal School at Morehead, Kentucky; and three and forty-five hundredths thirtieths for the construction, reconstruction, maintenance and repair of roads and highways, and for the payment of the interest on and for the creation of a sinking fund for the liquidation of State bonds issued for roads and other purposes; and eight-sixteenths of the inheritance taxes, plus the aggregate amount of all other State revenue realized from every other source not mentioned above, shall be credited to the general fund for the use of the ordinary expenses of the government, and the Auditor of Public Accounts will make distribution of said tax in accordance with the said apportionment at the end of each month. The tax herein provided for the University of Kentucky is in lieu of the tax provided by an act entitled: "An Act for the benefit of the Agricultural and Mechanical College," approved April twenty-ninth, one thousand eight hundred and eighty, and the annual appropriation now made for the University of Kentucky under the provisions of section four thousand five hundred and thirty-five-b, Kentucky Statutes, edition one thousand nine hundred and fif-

teen; the annual appropriation now made for the University of Kentucky under the provisions of subsection four of section four thousand six hundred and thirty-six-b, Kentucky Statutes, edition one thousand nine hundred and fifteen; the annual appropriation now made for the University of Kentucky by the act which became a law March twenty-sixth, one thousand nine hundred and four, acts one thousand nine hundred and four, chapter one hundred and twenty; the annual appropriation now made for the University of Kentucky under the provisions of subsection five of section four thousand six hundred and thirty-six-c, Kentucky Statutes, edition one thousand nine hundred and fifteen. The tax herein provided for the Western Kentucky State Normal School and Teachers College and Eastern Kentucky State Normal School and Teachers College shall be in lieu of the appropriation made for the support of said schools in subsections twenty-nine, thirty-five and thirty-six of section four thousand five hundred and thirty-five-a and in section four thousand five hundred and thirty-five-b of the Kentucky Statutes, edition one thousand nine hundred and fifteen. The tax herein provided for the University of Kentucky and the normal schools shall be paid monthly, when and as collected, to the treasurers of these institutions in the amount set forth in this section, and shall be used by the University of Kentucky and the normal schools for their maintenance and support, and when sufficient sums shall have accumulated in the treasuries thereof, it may be used for the erection of buildings and the purchase of land and equipment. The tax herein provided for the State road fund shall be in lieu of the tax provided by an act entitled: "An Act to create and establish a system of public State roads and to provide for the construction and maintenance thereof."

§ 2. That section 3 of chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, approved May 2, 1917, be amended by repealing said section 3 and inserting in lieu thereof the following, so that

when said section is amended by substituting and re-enacting the following in lieu thereof, the same shall read as follows:

Section 3. The individual stockholders of a corporation, at least seventy-five (75%) per cent of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky (including the corporate franchise when the franchise is required to be assessed), provided the shareholder furnishes satisfactory proof to the taxing authorities that at least three-fourths of the total property of such corporation is taxed in Kentucky.

§ 3. That section 4 of chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, approved May 2, 1917, as amended and re-enacted by chapter 18 of the Acts of the General Assembly of 1922, approved March 20, 1922, be amended by repealing said section 4 of chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, and also by repealing chapter 18 of the Acts of the General Assembly of 1922, and inserting in lieu thereof the following section, so that when said sections are amended by substituting and re-enacting the following section in lieu thereof, the same shall read as follows:

Section 4. All property subject to taxation for State purposes shall be subject also to taxation in the county, city, school, or other taxing district in which same has a taxable situs, except the following classes of property which shall be subject to taxation for State purposes only:

(1) Farm implements and farm machinery owned by a person actually engaged in farming and used in his farm operation.

(2) Live stock, domestic fowls, capital stock of building and loan associations and bank deposits.

(3) Machinery and products in course of manufacture, of persons, firms, or corporations, actually engaged in

manufacturing, and their raw material actually on hand at their plants for the purpose of manufacture and unmanufactured agricultural products in the hands of the producer or in the hands of any agent or agency of the producer to which said products have been conveyed or assigned for the purpose of sale by the producer. Provided that persons, firms or corporations actually engaged in the printing, publication and distribution of a newspaper or newspapers, or operating a job printing plant, shall be deemed to be actually engaged in manufacturing within the meaning of this act.

(4) Money in hand, notes, bonds, accounts and other credits, whether secured by mortgage, pledge, or otherwise, or unsecured, and shares of stock; provided, however, that nothing in this section shall forbid local taxation of franchises of corporations or of the shares of banks, trust companies, or combined banks and trust companies doing business in Kentucky, or domestic life insurance companies.

And provided, further, every State bank and trust company incorporated under the laws of this Commonwealth, and every national bank doing business therein and located in any county, city, town or taxing district in this Commonwealth shall make to the State Tax Commission and to the assessing officer of the county, city, town or taxing district, on or before August first of each year, a report showing the following facts, to-wit: The name and post office address of the bank or trust company; the names of the president, cashier and board of directors thereof; the number of shares of stock, and the par and market value of each share; the amount of capital stock paid in; the amount of surplus fund and undivided profits, and the amount of real estate charged off which has not been actually sold and transferred; the amount of its deposits; the amount of cash on hand; the amount of bonds and other securities held by it; the amount loaned on mortgages and the amount of its loans and discount; the amount of value of all real estate situated in this Commonwealth, held and

owned by the bank or trust company on the first day of July of each year; and such other information as may be required. The assessing officer of the county, city, town or taxing district wherein any trust company, State and national bank is situated, shall assess the shares of such trust company, State and national bank for taxation for State, county, city, town or taxing district purposes. Each bank and trust company shall be entitled to have deducted from the total valuation placed on its shares the assessed value of its real estate in this State. It shall be the duty of the trust company and banks to list with the county tax commissioner of each county, and with the assessing officer in each city, town and taxing district its real estate and pay taxes thereon to the sheriff and to the collecting officer of each city, town and taxing district, and such officer shall make out and return the assessment to the proper authorities of the county, city, town or taxing district, at the same time and manner as prescribed by law for the return of the assessment of personal property therein.

And provided, further, that every association, company or corporation incorporated or organized under the laws of this Commonwealth, or doing business in this Commonwealth, and whose stock is liable to assessment and taxation under section 2 of this act, except banks, trust companies, or combined banks and trust companies doing business in Kentucky, and domestic life insurance companies, shall on or before the first day of August of each year make a true and correct report to the State Tax Commission, verified by its president, secretary, treasurer or other chief officer, giving the names and addresses of residents of Kentucky who hold its shares of stock and outstanding bonds as of July first previous thereto, and also the transfer of any of its stocks or bonds by residents of Kentucky to non-residents within thirty days previous to July first. The contents of the reports mentioned in this section shall be confidential, and shall not be divulged except for the purpose of securing the assessment of same for taxation.

The equalization, collection, penalties and laws relating thereto, now provided by law for other personal property in the county, city, town or taxing district, shall apply in like manner to the collection of the taxes herein provided for. Any county, city, town or taxing district, not now having the right to collect such taxes by suit, is hereby authorized and empowered so to do. Nothing herein shall be construed to repeal or amend chapter thirty-three of the Acts of 1904, approved March 18, 1904, entitled, "An Act to amend the revenue laws of the cities of the first class so as to carry into effect the amendment of section 181 of the present Constitution.

§ 4. That section 5 of chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, approved May 2, 1917, be amended by repealing said section 5 of chapter 11 and inserting in lieu thereof the following section, so that when said section is amended by substituting and re-enacting the following section in lieu thereof, the same shall read as follows:

Section 5. Report of Mortgage Assignments Required —Penalty. Every bank, trust company or combined bank and trust company doing business in Kentucky shall on or before August first of each year file with the Tax Commission a report verified by the oath of its president, vice-president or cashier, showing as of July first:

(a) A list of the notes, bonds or other evidences of indebtedness secured by mortgage or other recorded instruments standing in its name of record, which it has assigned during the preceding year without transferring same of record, the amount of each, and the name and address of the person to whom each was assigned; provided, that where the name and address is given of the transferee holding same on July first of any year, any previous transfers of said securities during that year need not be furnished.

(b) A list of the mortgages assigned of record to it during the preceding year with its knowledge or consent, where it has not become the absolute owner of the debt se-

cured thereby, standing in its name on July first, the amount of each of such mortgages and the name and address of each of such assignors; provided, any mortgages assigned to it as aforesaid during any year and paid and released of record prior to July first need not be included in such report.

Provided, however, that the reports required under clause (a) or clause (b) need not include either sales or pledges from one bank, trust company or combined bank and trust company to another bank, trust company or combined bank and trust company, or notes or obligations secured by any recorded instrument executed to a bank, trust company or a combined bank and trust company, in which the obligations secured by said instrument or divided among estates or accounts in charge of said bank, trust company or combined bank and trust company, and regularly and properly entered on the records of said trust company, bank or combined bank and trust company.

Provided, further, the provisions of this section shall not apply to mortgages made by corporations to trustees to secure bond issues made by them in the regular course of business.

The information thus obtained shall be communicated by the Tax Commission to the county tax commissioner and board of supervisors of the respective counties in which the true owners of such debts reside. Failure to file such reports shall be punishable by a fine of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00), and each day's delay or failure to file such report shall constitute a separate offense. Wilful false statement in such reports shall be punishable as false swearing.

Any person, firm or corporation which shall transfer or assign of record any mortgage note or bond or other evidence of indebtedness, secured by any recorded instrument, for the sole purpose of evading the taxes thereon, shall be guilty of a misdemeanor and punishable by fine of

not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00).

§ 5. That section 6 of chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, approved May 2, 1917, be amended by repealing said section 6 and inserting in lieu thereof the following section, so that when said section is amended by substituting and re-enacting the following section in lieu thereof, same shall be read as follows:

Section 6. Omitted Property—Penalty—Limitation. When any money in hand, notes, bonds, accounts or other credits, secured or unsecured, or shares of stock liable to assessment shall in any one year be omitted from assessment, as provided by law, it may at any time not later than ten years thereafter be assessed retrospectively in the manner provided by section 4258 to 4267, Kentucky Statutes, except that, in addition to the penalty prescribed by those sections, a penalty of one hundred per cent (100%) of the amount of the taxes and interest at six per cent (6%) per annum from the time the taxes should have been paid, shall be recovered. Said additional penalty and interest shall be paid into the state treasury. Provided that no action shall be commenced nor proceeding taken on behalf of the State or any county, city, town or taxing district to assess for taxation for any period any personal property described in this section required to be listed for taxation which was assessed for taxation as of September 1, 1917.

§ 6. That section 1 of chapter 65 of the Acts of the General Assembly of 1920, approved March 22, 1920, be and the same is hereby repealed.

§ 7. That section 1 of chapter 10 of the Acts of the Extraordinary Session of the General Assembly of 1917, as amended and re-enacted by section 1 of chapter 83 of the Acts of the General Assembly of 1920, approved March 23, 1920, be amended by repealing said section 1 of chapter 10 of the Acts of the Extraordinary Session of the General Assembly of 1917, and also by repealing section 1 of chapter

83 of the Acts of the General Assembly of 1920, and inserting in lieu thereof the following section, so that when said sections are amended by substituting and re-enacting the following section in lieu thereof, the same shall read as follows:

Section 1. All live stock and all domestic fowls shall be taxed for State purposes at the rate of fifty (50c) cents on each one hundred ($100.00) dollars of assessed value, and shall be exempt from taxation for all local purposes; provided, however, that twenty-five domestic fowls to each family shall be exempt from taxation for any purpose whatever.

§ 8. That section 1 of chapter 4 of the Acts of the Extraordinary Session of the General Assembly of 1917, approved May 2, 1917, be amended by repealing said section 1 of chapter 4 of the Acts of the Extraordinary Session of the General Assembly of 1917, and inserting in lieu thereof the following section, so that when said section is amended by substituting and re-enacting the following section in lieu thereof, the same shall read as follows:

Section 1. Tax on Bank Deposits. Every person, firm or corporation having, on the first day of July, a deposit in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, shall pay a tax to the State which is hereby assessed at the rate of one-tenth of one per cent annually, upon the amount of such deposit so held by such bank on the first day of July, and no deduction therefrom should be made on account of any indebtedness. The taxes imposed by this section shall be paid by such bank, trust company, or combined bank and trust company, or national bank, for and on behalf, and as the agent of the depositor therein to the auditor on or before the first day of September next following the date whereon the report provided for in section 9 of this act.

§ 9. That section 3 of chapter 4 of the Acts of the Extraordinary Session of the General Assembly of 1917,

approved May 2, 1917, be amended by repealing said section 3 of chapter 4 of the Acts of the Extraordinary Session of the General Assembly of 1917, and inserting in lieu thereof the following section, so that when said section is amended by substituting and re-enacting the following section in lieu thereof, the same shall be read as follows:

Section 3. Banks to Report and Pay Tax on Deposits. Each bank, trust company, or combined bank and trust company and national bank doing business in this State, shall file on or before the twenty-first day of July in each year, with the State Tax Commission, a report setting forth the total amount of its deposits as of July first of each year, which would be taxable in the name of the depositor, but excluding therefrom such deposits as are not taxable against the depositor under the laws of this State, and shall, on or before the first day of September of each year, pay to the auditor one-tenth of one per cent of the amount of such deposits, and may charge to and deduct from the deposit of each depositor the amount of the tax so paid for and on his behalf, and a lien as of July first of each year is hereby given to the banks and trust companies so paying the tax on the funds belonging to each depositor, respectively, on July first of each year on which the tax shall be so paid by them.

Any claim for taxes against the depositor charged to or otherwise asserted against him by the bank paying the taxes shall be so charged or asserted within six months after the payment of the taxes to the auditor, and all claims, demands or lien therefor shall be thereafter barred.

§ 10. In event a referendum is desired upon this act, then such referendum shall be conducted in all things in the manner provided in chapter 8 of the Acts of the Extraordinary Session of the General Assembly of 1917, approved May 2, 1917.

§11. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional, the decisions of the courts shall not affect or impair any of the

remaining provisions of this act. *It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions not been included therein.*

§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

§ 13. Whereas, *the present State revenue and taxation laws impose an unequal burden of taxation upon real estate, and it is necessary for an immediate equalization of the distribution of the burden of taxation upon the various classes of property in this Commonwealth,* an emergency is declared to exist, and this act shall become a law and effective upon its passage and approval by the Governor.

Approved March 4, 1924.

**(Section 171, Kentucky Constitution, as originally written —in the 1915 Statutes.)**

"Section 171. *Levy and collection of by general laws—uniformity.* The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

**(Section 171, Kentucky Constitution, as amended—and now in the 1930 Statutes.)**

"Section 171. *Levy and collection of taxes by general laws; public purposes only; uniform within the class and territory; classification of property; bonds of state and its divisions exempt; referendum of laws classifying property; provisions for.*—The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the common-

wealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"The general assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.

"Any law passed or enacted by the general assembly pursuant to the provisions of or under this amendment or amended section of the constitution, classifying property and providing a lower rate of taxation on personal property, tangible or intangible, than upon real estate, shall be subject to the referendum power of the people, which is hereby declared to exist to apply only to this section, or amended section. The referendum may be demanded by the people against one or more items, sections or parts of any act enacted pursuant to or under the power granted by this amendment, or amended section. The referendum petition shall be filed with the secretary of state not more than four months after the final adjournment of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people under this section. All elections on measures referred to the people under this act shall be at the regular general election, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become a law when approved by the majority of the votes cast thereon, and not otherwise. The whole number of votes cast for the candidates for governor at the regular election last preceding the filing of any petition shall be the basis upon which the legal voters necessary to sign such petition shall be counted. The power of the referendum shall be ordered by the legislative assembly at any time any acts

or bills are enacted, pursuant to the power granted under this section or amended section, prior to the year of one thousand nine hundred and seventeen. After that time, the power of the referendum may be ordered either by the petition signed by five per cent (5%) of the legal voters or by the legislative assembly at the time said acts or bills are enacted. The general assembly enacting the bill shall provide a way by which the act shall be submitted to the people. The filing of a referendum petition against one or more items, sections or parts of an act shall not delay the remainder of that act from becoming operative." (The foregoing section appears as amended by the act of March —, 1914, c. 94, p. 497, ratified by the people at the general election in November, 1915.—Ed.)

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DEC 19 193

CHARLES ELMORE CR
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THE

# Supreme Court of the United States

OCTOBER TERM, 1930.

No. 11.

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JUNIUS C. KLEIN, - - - - - Appellant,

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - Appellee.

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## PETITION FOR REHEARING.

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JOHN S. MILLIKEN,
JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
JUNIUS C. KLEIN,
*Counsel for Appellant.*

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

THE

# Supreme Court of the United States

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**No. 11.**

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JUNIUS C. KLEIN, - - - - - *Appellant,*

*vs.*

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - *Appellee.*

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## PETITION FOR REHEARING.

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Comes now the above named Junius C. Klein, and presents this, his petition for rehearing of the above entitled cause, and, in support thereof, respectfully shows that on the 24th day of November A. D. 1930, this Court filed an opinion herein, and caused to be entered an order affirming the judgment of the State Court; that the opinion affirmed said judgment of the State Court upon two grounds, viz.:

(1) That the Act of 1924, Ky. Stats., §4088, did not deny to appellant the equal protection of the laws assured to him by the Fourteenth Amendment to the Federal Constitution; and

(2) That the assessment by the Tax Commissioners and officers of Kentucky did not deny to such appellant the equal protection of the laws in assessing his

shares of stock at 100% of value while assessing real estate in Kentucky at 69.9% in Jefferson County, and at 65% or 70% in other Counties in said State.

Notwithstanding the confidence we originally had in the first point, especially in view of the decision of this Court in *Louisville Gas & Electric Company* v. *Coleman,* 277 U. S. 32, we shall not ask of this Court a rediscussion of it, and its reconsideration of this question.

A study of the Court's opinion, however, on the second point, induces in us the belief that we failed to give to the Court the proper exposition of the effect of the Amendment of 1915 to Section 171 of the Constitution of Kentucky, classifying property for taxation.

As we shall show hereinafter, this Court may have been misled by the language of the State Court, 230 Ky. 186 (R. 58).

We recognize, as recited by this Court, that the Fourteenth Amendment does not forbid a State's classifying property as real and personal and making distinction between the rates of taxation on them respectively. This has always been the case, as we understand it (Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232).

The changes made in the State Constitution by the 1915 Amendment, we submit, no more authorize assessors to assess land at one percentage of real value and personalty at another, than did the section before amendment. That section was considered in the case of *Greene, &c.,* v. *Louisville & I. R. Co.,* 244 U. S. 499, and the Kentucky Constitution still requires all property

assessed at the same percentage of real value (fair cash value), as it did in the *Greene case* (244 U. S. 508).

Section 171 previously required levy of taxes to be "uniform *upon all property subject to taxation* within the territorial limits of the authority levying the tax;" and the section as amended in 1915 requires that "taxes shall be levied and collected for public purposes only and shall be *uniform upon all property of the same class* subject to taxation within the territorial limits of the authority levying the tax." Section 171 has always related solely to rate and never to assessment. So, the classification applies to rate, and not to assessment.

Neither the original section, nor the section as amended, authorizes assessment of property at different percentages of value, but on the contrary, Section 172 has always provided that "all property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilfull error in the performance of his duty, shall be deemed guilty of misfeasance and upon conviction thereof shall forfeit his office and be otherwise punished, as may be provided by law."

Section 174 has always provided:

> "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property."

It is demonstrated, therefore, that by Section 172 property must be assessed at fair cash value and that by Section 174 "all property * * * shall be taxed in proportion to its value."

By these sections the Commonwealth has a symmetrical and consistent system of taxation; but if taxing assessors could, instead of assessing property "in proportion to its value," or "at its fair cash value," determine at what percentage of value they would assess property, or under-assess property of such class or classes as they wished to select, it is obvious that the assessors would fix the rate of taxation upon different classes of property, and even change the rates prescribed by the Legislature.

For illustration, our Statute fixes 30c on the $100 as the rate on real estate, and 50c on other property; if then the assessors could assess real estate at 70% of value they could thereby reduce the rate on real estate to 21c (or 70% of 30c); or the assessors could assess personal property at 70% of real value and thereby reduce the rate on personalty from 50c to 35c (or 70% of 50c).

In as much, therefore, as the assessors reduced the rate on real estate by under-assessing it, these officers of the State denied appellant (owner of stock) the equal protection of the laws. This is established by the decision in the *Greene case,* and cases following it.

The principle for which we contend (established by the Greene case) is even more clearly affirmed in *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441.

The decision in the Greene case was followed by the Kentucky Court in *Eminence Dist. Co.* v. *Henry County Board,* 178 Ky. 811 (p. 823), January 25, 1918.

In the *Eminence case* the Kentucky Court based its decision as well upon the Fourteenth Amendment (p. 821) as upon the State Constitution, and quoted at length from this Court's opinion in the *Greene case* (p. 823).

This Court may have been misled by the language, doubtless inadvertently used by the State Court, in the *Klein case,* 230 U. S. 186, (Rec. 58), *viz.:*

> "Appellant cannot at least complain that property in a different class from his is assessed too low unless the inequality is gross, or such as to show an unreasonable discrimination."

The State Court concludes its exposition of the principle considered by saying:

> "The Court is unable to see, therefore, that appellant is entitled to any relief under the Constitution of the State."

What the Court said with reference to the State Constitution is immaterial to what this Court may decide under the Federal Constitution. Furthermore, the State Court referred solely to "land in Jefferson County," *while the findings of fact made by the Trial Court* (Rec. 47) show that appellant's case is not confined to assessment in Jefferson County, but extends to "the ratio, or average, of the assessments for taxation of real estate in all of the counties of the State of Ken-

tucky, for said year 1924, are between 65% and 70% of the fair cash values of same" (Rec. 47).

It results, too, from the Trial Court's *findings of fact* that the concluding sentence of the State Court's opinion, *viz.:*

> "Appellant cannot complain that land in Jefferson County is equalized at 70 per cent.; for land is equalized in each county by the County Board, because land values depend on local conditions; but intangible property is equalized by the State Board and is uniform throughout the State."

evidently overlooked the Trial Court's findings that assessments *"in all of the counties" were "between 65% and 70% of the fair cash values of same."* (Italics ours.)

The State Court cannot conclude this Court by the statement (230 Ky. 186—Rec. 58):

> "Appellant cannot at least complain that property in a different class from his property is assessed too low *unless the inequality is gross or such as to show an unreasonable discrimination."* (Italics ours.)

This Court will decide the question of unreasonableness for itself. In the *Greene case* (244 U. S. 499) this Court affirmed the judgment of the Circuit Court (Cochran, J.) where the percentage of assessed value was 40% below the fair cash value, and in the *instant* case the discrepancy is 30 or 35%. In the *Sioux City Bridge case* the assessed value was 45% less than the fair cash value, and this Court, as it did in the *Greene*

*case,* reduced the valuation, or assessment, of complainant's property to the reduced valuation of other property.

It is clear that the State Court cannot control this Court on the point just quoted from the State Court's opinion.

Nor can the State Court conclude this Court where the evidence forces a conclusion by this Court different from that reached by the State Court. This has been settled by repeated decisions of this Court since *Kansas City Southern Ry.* v. *Albers, &c., Co.,* 223 U. S. 573.

Our remedy, as appears from the *Greene case* and the *Sioux City Bridge case,* is to have the assessment of our property reduced to 65% or 70% of the valuation fixed by the assessors. The question is well settled by this Court in its opinion in the *Sioux City Bridge case,* 260 U. S. 446.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that the judgment of the Court of Appeals of Kentucky be, upon further consideration, reversed.

JOHN S. MILLIKEN,
JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
JUNIUS C. KLEIN,
*Counsel for Appellant.*

## CERTIFICATE OF COUNSEL.

I, John S. Milliken, counsel for the above named appellant, do hereby certify that the foregoing petition for rehearing in this case is presented in good faith and not for delay.

JOHN S. MILLIKEN,
*Counsel for Appellant.*

# APPENDIX.

*Kentucky Constitution, Section 171:*

"The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"The general assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.

"Any law passed or enacted by the general assembly pursuant to the provisions of or under this amendment or amended section of the constitution, classifying property and providing a lower rate of taxation on personal property, tangible or intangible, than upon real estate, shall be subject to the referendum power of the people, which is hereby declared to exist to apply only to this section, or amended section. The referendum may be demanded by the people against one or more items, sections or parts of any act enacted pursuant to or under the power granted by this amendment, or amended section."

(Note: The residue of the section refers to procedure on referendum.)

*Kentucky Constitution, Section 172:*

"All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilfull error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law."

*Kentucky Constitution, Section 174:*

"All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises."



# SUPREME COURT OF THE UNITED STATES.

No. 11.—October Term, 1930.

Junius C. Klein, Appellant,
*vs.*
Board of Tax Supervisors of Jefferson County, Kentucky.

Appeal from the Court of Appeals of the State of Kentucky.

[November 24, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Appeals of Kentucky affirming the validity of a State tax and the constitutionality of the statutes under which the tax was imposed. 230 Ky. 182.

Holders of stock in a corporation generally are required to list their shares for taxation, but it is provided that "the individual stockholders of a corporation, at least seventy-five per cent (75%) of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky" &c. Kentucky Statutes, § 4088. Ed. Carroll, 1930. Acts 1924, c. 116, § 2, pp. 402, 406. The appellant contends that this section makes the tax contrary to the Fourteenth Amendment. The appellant owned shares in the Standard Sanitary Manufacturing Company, a New Jersey corporation, less than seventy-five per cent of whose total property was taxable in Kentucky. He was taxed as contemplated and he says that the discrimination between himself and holders of stock in a corporation paying taxes on more than seventy-five per cent of all their property is arbitrary and denies to him the equal protection of the laws.

This contention was so thoroughly disposed of by the Court of Appeals that it is not necessary to deal with the argument for the appellees that if § 4088 is invalid the general tax law stands unaffected and unqualified and the appellant still must pay the tax. It will be enough to present an abridgment of the considerations

that prevailed. There is no doubt that a State may tax a corporation and also tax the holders of its stock. *Tennessee* v. *Whitworth*, 117 U. S. 129, 136. The owners are different and, although the appellant calls it a mischievous fiction, the property is different. While no doubt the property and expectations of the corporation are the backbone of the value of the shares, yet the latter may get additional value from another source. In this case the appellant alleges that the price of shares was much enhanced by rumors of a stock dividend, which of course would have added nothing to the property of the corporation. On the other hand there is no constitutional obligation to tax both the corporation and the holders of its stock. See *Kidd* v. *Alabama*, 188 U. S. 730, 732. If the corporation having all its property in the State has paid taxes upon the whole, usually it would be just not to tax the stockholders in respect of values derived from what already has borne its share. And what would be true in the case supposed would be true when the corporation was paying for the great body of its property although some small fraction happened to be outside of the State. Thus we come to the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355. Numerous illustrations are cited by the Court below, e. g., *McLean* v. *Arkansas*, 211 U. S. 539, 551. *Booth* v. *Indiana*, 237 U. S. 391, 397. *Miller* v. *Strahl*, 239 U. S. 426, 434.

We agree with the Court of Appeals that there could have been no question if the statute had said ninety per cent and that fixing seventy-five was equally plainly "a reasonable effort to do justice to all in view of the way all our other assessments are made."

The appellant, pursuing his notion that shares of stock represent an interest in the property of the corporation insists that if taxed at all he should be taxed only in the ratio of the property in the State to the entire property of the corporation; that to tax him for the whole value is to tax property outside of the jurisdiction of the State. But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members. *Donnell* v.

*Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273. The stockholders in some circumstances can call on the corporation to account, but that is a very different thing from having an interest in the property by means of which the corporation is enabled to settle the account. The principle of justice that leads to the exemption that has been dealt with could not be insisted upon as a matter of constitutional right and it is reasonable for the legislature to confine it to well marked cases, rather than to press it to a logical extreme. Of course it does not matter here that in an earlier year the exemption was greater than now.

It is alleged as a distinct point of objection, though perhaps less earnestly pressed, that appellant's stock was assessed at its full selling price whereas land was taxed at seventy-five per cent of its sale value There is nothing in the Fourteenth Amendment that requires land and stock to be taxed at the same rate or by the same tests and the Court of Appeals thinks that the Board of Tax Commissioners "judged that seventy-five per cent of the sale values represented about fairly the cash value of real estate." Whether this be so or not we see no constitutional ground for complaint.

*Judgment affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*